



## Deliberating Constitutional Futures

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# DELIBERATING CONSTITUTIONAL FUTURES

18 February 2020  
Belfast #FuturesNI



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## DELIBERATING CONSTITUTIONAL FUTURES

# ‘WE THE PEOPLE’

*Democracies govern in the name of ‘We the People’ and referendums appear as the most direct way of involving the people in self-government. At the same time referendums carry important risks. Perhaps the most sensitive of these efforts to consult ‘We the People’ are precisely in those situations where the very identity of the people themselves is in question.*

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### Report of a TJI workshop held in Ulster University, Belfast, 18 February 2020.

Eilish Rooney, Rory O'Connell, Fidelma Ashe, Cathy Gormley Heenan, Colin Harvey, Aoife O'Donoghue, Conor O'Mahony, Catherine O'Rourke, Jane Suiter, Silvia Suteu, Alan Whysall, Richard Wyn Jones.

### Acknowledgments

Thank you to our speakers for their thoughtful and engaging contributions. As well as our speakers, we were fortunate to have an active audience on the day who were encouraged to participate by chairpersons, Brice Dickson, Anne Smith, Ciaran White and Catherine O'Rourke. We thank Joanna McMinn for her help with the workshop and in particular the drafting of this report. We are grateful to Nigel McDowell of Ulster University for his photography work. We acknowledge the invaluable support from Sadie Magee and the professional services staff of Ulster University. Finally, we thank Rick Smith for the design and production of this report. *Eilish Rooney and Rory O'Connell*

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## FOREWORD



Debates about Northern Ireland's possible constitutional futures, and the potential revisioning of constitutional relationships on these islands, have been brought to a new juncture by developments surrounding Brexit.

TJI work on Northern Ireland's possible constitutional futures is, however, not at all new; it has been a longstanding theme of the Institute's scholarship. In the more immediate aftermath of the Belfast/Good Friday Agreement, the constitution-type quality of the peace agreement itself motivated TJI scholarship, as did the novel hybrid of domestic and international law norms given constitutional expression through the peace agreement.

In addition, extensive – and ongoing – TJI work has addressed the process, potential content and significance of a Bill of Rights for Northern Ireland and an All-Island Charter of Rights. Recent TJI scholarship has examined challenges in reconciling Northern Ireland's devolved status within the UK welfare and rights framework.

Throughout this scholarship, and in this new phase of constitutional deliberations, the TJI has brought two particular contributions to bear: the first is the importance of an international and comparative perspective; and the second is the need to ask – consistently and persistently – who is or may be excluded from these debates, with a particular emphasis on gender inclusion. The Deliberating Constitutional Futures workshop, and this report, reflect, embody and substantively advance both of these contributions. I commend the report to you.

*Dr Catherine O'Rourke*

*Director of the Transitional Justice Institute*

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## CONCEPT NOTE

Democracies govern in the name of ‘We the People’ and referendums appear as the most direct way of involving the people in self-government. Amidst fears that the public are becoming disenchanted with representative democracy and de-aligned from political parties, referendums offer one route to re-engage the people in politics.

At the same time referendums carry important risks. There are many questions about the technical operation of referendums, perhaps especially in a country like the UK lacking a codified constitution and tradition of direct democracy. The wording of a referendum is vital to get right. And referendums are not necessarily conducive to democratic deliberation. The discourse around a referendum may arouse tensions and incite incivility. They represent the risk of a majoritarian solution in a context where minorities may feel marginalised.

Perhaps the most sensitive of these efforts to consult ‘We the People’ are precisely in those situations where the very identity of the people themselves is in question.

A possible referendum is part of the Belfast or Good Friday Agreement, as part of a nuanced package of measures to resolve the protracted conflict in the divided society of Northern Ireland. The Agreement recognises the right of the people of Northern Ireland to be Irish or British or both and recognises their right to decide whether to remain a part of the United Kingdom or to join Ireland. One of the unintended consequences of the UK’s 2016 Brexit referendum has been to increase the likelihood of such a ‘border poll’.

The stakes in any such referendum would be high. For the people of Northern Ireland, it would mean re-joining the European Union. For Ireland it would imply constitutional change. And there is the risk of increased tensions among Northern Ireland’s divided and segregated society and possible unrest or violence.

These issues have a special historical and political resonance in the context of Northern Ireland, but they are not uniquely Northern Irish. It is important to reflect on international and comparative learning to consider how to conduct a border poll. In particular how could a border poll be conducted in a way that encourages deliberation and the genuine participation of people across society and across the divisions of this society? This workshop brings together experts on referendums internationally and within the different jurisdictions in these islands to reflect on the past and prepare for the future.

*Rory O’Connell & Eilish Rooney*



## INTRODUCTION



The prompt for today's workshop is the increased speculation about a border poll in these jurisdictions. Brexit has made this more topical; and we have seen different groups such as Constitutional Conversations, and the Working Group on Unification Referendums on the island of Ireland (several members of that group are here today) focused on these issues. Despite a recent survey showing only 29% of people in NI support re-unification, which is certainly well short of any sort of the majority required in the GFA for a border poll, it is also the highest that figure has been recorded at.

So, while the main focus may be our own local situation, referendums are not uniquely Northern Irish, or even Irish; many other countries have experience with referendums, and we hope to hear about experiences, thoughts and reflections from other parts of these islands. Referendums are topical and controversial, not just on these islands but much further afield.

Eilish and I started planning this event back in September 2019, settling on the date for this event quite early on. We did not envisage at that time there would be an early UK General Election, approval of the UK Withdrawal Agreement, the return of Stormont, or the Irish General Election, never mind the results of the Irish General Election.

So, let me thank Eilish for the inspiration for this Workshop, and for her practical work in its organisation of this workshop, as well as Sadie Magee, who provided the administrative support and helped us with travel and accommodation.

The purpose of the workshop is to encourage discussion and exchanges, involving as many in the audience as possible. In response to a question for the workshop participants, starting off, this interactive slide displayed the comments: *(see next page)*.

*Rory O'Connell*



*Despite a recent survey showing only 29% of people in NI support re-unification, which is certainly well short of any sort of the majority required in the GFA for a border poll, it is also the highest that figure has been recorded at.*





# WHAT POPS INTO YOUR MIND ON HEARING 'REFERENDUM ON IRISH UNITY' (BORDER POLL)?



**PANEL 1:**  
**INTERNATIONAL PERSPECTIVES ON REFERENDUMS  
AND CONSTITUTIONAL QUESTIONS**



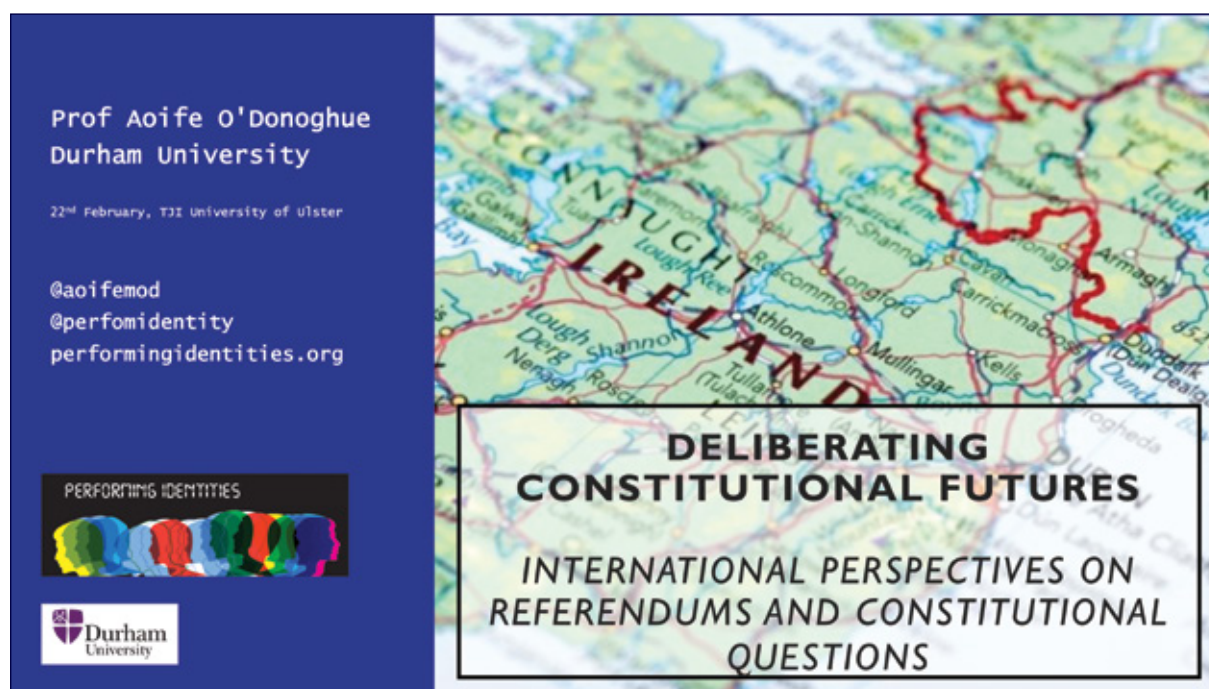
**Prof Aoife O'Donoghue**, Law School, Durham University

*Chair:* **Prof Brice Dickson**, School of Law, Queen's University of Belfast

**Prof Rory O'Connell**, School of Law and Transitional Justice Institute, Ulster University

# PRESENTATION 1: DELIBERATING CONSTITUTIONAL FUTURES

Prof Aoife O'Donoghue, Law School, Durham University



I am approaching this from two perspectives; firstly, from a doctrinal international law perspective, which won't cover the international human rights elements; and from a second perspective, I will talk about what feminist referendums are, what feminist deliberation is and how feminist discourse, connected to other work I am doing, is related to the questions posed here.

The first thing to say about international law is that it pays little attention to democracy, but a huge amount to sovereignty. Democracy is not a definition of statehood, but sovereignty very much is.

There are a range of European Reports, examples and treaties but these form part of regional customary international law and may be regarded as not yet binding within broader international law. There is Article 3 of the First Protocol to the European Convention on Human Rights (ECHR) and Article 25 of the International Covenant on Civil and Political Rights (ICCPR), but these are on electoral law and on elections, and how you follow them; they give very useful pointers as to what should happen, but on democracy not so much. There are also international organisations with some practice like the European Union, which establishes some strong practice. The Commonwealth used to care [about how governments are elected], but no longer pays much attention; the African Union increasingly is getting involved with whether or not governments are democratically elected.

That brings us to another issue within international law, that is the recognition of governments, which, as we can see with Venezuela, has had a huge comeback. Recognising governments is much more tied to questions around democracy and deliberations, and “thick” ideas about democracy, but this may be limited to Venezuela and power plays.

Of course, we have the right to self-determination, but I would argue that self-determination, beyond the very structured UN process of decolonisation, is very rarely legal until after the fact. It is very hard to argue that you have, say, a remedial right to self-determination, as Catalonia demonstrates pretty well. It is very hard to meet that barrier, because it is so narrowly construed. A vote for self-determination and territorial changes doesn’t mean you get new states or you get reunification. The vote on the Good Friday Agreement (GFA), or devolution in Scotland and Wales were all exercises in self-determination, within that broad definition.

Referenda can be nonbinding, e.g. as happened in Bougainville, where there was an overwhelming vote for independence, but nearby states said they would not recognise it. It wasn’t ever going to be a binding referendum. There you had a well-run referendum, according to Bertie Ahern who acted as an observer, a lot of debate and engagement, but other nearby states, e.g. Australia, didn’t recognise it. So, even if you do fulfil all the criteria, just because you have run a referendum democratically doesn’t necessarily mean anything when it comes to statehood and sovereignty.

The ties to the 19th century are all-important when you are thinking about context. There are many complicated examples of countries across Europe breaking up and reforming, and they all tend to be different. There tends to be a lot of variety, and a part of this is the question of sovereignty, and particularly who is sovereign. This is going to become very important here [in NI] for example because you also have UK Parliamentary Sovereignty.

Who is sovereign? Is it the people? If it’s the people, and you have that problem of reconstituting yourself, of recreating yourself, then that is very much tied to democracy. As soon as democracy gets tied into sovereignty and the people, international law backs off again. International law does not care who is sovereign within a particular state. The Good Friday/Belfast Agreement settled some of those questions; it did pick the group of people who would be voting, but I will come back to that question.

Going back to the 18th century, referendums on territory are the most common referenda. Territorial changes globally are the most common, and you would think there'd be a lot of practice to look at, but there isn't. As Crimea demonstrates, holding a referendum in and of itself does not mean it's democratic, or that everyone will accept it, and Bougainville is another good example. What standards there are, and what standards have to be met to be accepted, are not part of customary international law to any great extent. You can have undemocratic referenda; you can also have referenda that are absent of any thick conception of democracy.

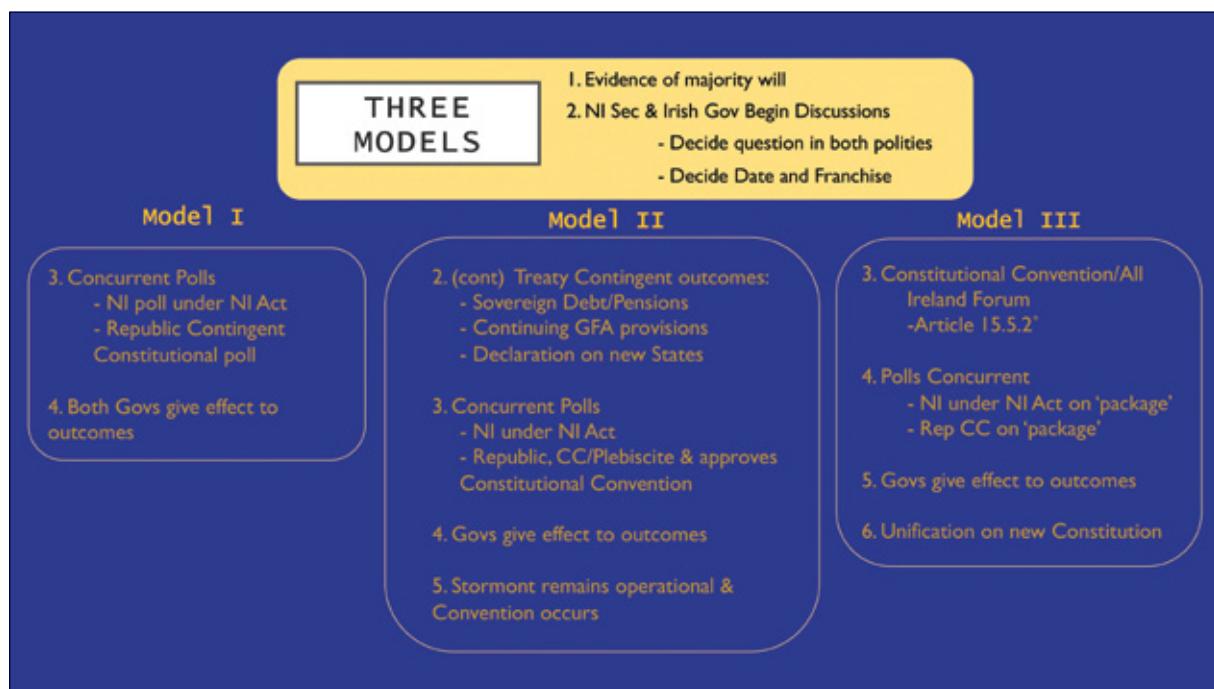
There are constitutional restrictions on who can vote, e.g. in the GFA, a unionist living in the south, asylum seekers living in direct provision, or a citizen of Ireland living in the north, not a citizen of Northern Ireland, would not get a vote. So, who we are we talking about when we are talking about sovereign will becomes important.

Again, if we are talking about a thick idea of democracy, who is involved in the deliberations, who is involved in the debates? International law does not have any requirement for deliberations or of thick democracy. It raises questions about whether populations are well suited for the task? Anti-referendum sentiment often gets thrown in with fears of majoritarianism and majority tyranny. But you never get a fear of the minority, and by minority here I mean the minority elite, not minorities in a rights context, the powerful within a state, the decision makers. There is rarely a fear of what they might do; there is a fear of what the people might want to do but rarely a fear of what a minority elite might choose to do.

In the Republic, there is also a fear of reconstituting, reimagining; a clasp on to the Constitution and what it means, a kind of hagiography that exists around documents. It reflects a conservative tendency, which also applies to the Good Friday Agreement, a document that for very good reasons people don't want to tamper with; but then you get a document that gets elevated above contestation and debate. I'm with Thomas Paine in believing every generation is as capable as the next generation about writing constitutional documents.

When we think about who is well suited, if we think that people are sovereign, or parliament is sovereign, all those questions are tied together, and if we don't think the people are suitable who do we think are suitable? Why do we think that group?





Working with Colin Murray on a project 'Performing Identities', we came up with three models. Our concern with a model is with the question of who or what group of people should be making decisions. Model 1 is a straightforward very simple model, but in that process, you are likely to have lots of discussion and lots of debate. So, who are we talking to?

In another project I'm doing with Mairead Enright, Catherine O'Rourke and Liam Thornton in Dublin, carrying on from the NI Feminist Judgements Project, we are talking about rewriting constitutional documents from a feminist perspective. We had a workshop where we looked at Article 41.2 which is the article that rarefies the woman in the home, and we deliberately had very few lawyers in the room; we mainly had activists and artists and they were more than capable of discussing all the issues we raised; and they were very good at producing excellent text that was extremely pertinent, important and well thought out. The lawyers were there but didn't get involved. The point was to see how people would get on. The women questioned their own expertise and ability to tackle legal texts and drafting, but once they realised they did have the expertise they were more than capable of deliberating and drafting.

That idea of expertise – who deliberates and who gets involved in all of these moments is really important. Who gets engaged? Who gets to talk about it? What kind of Ireland do we want if we were going down this path?



Expert legal capture is really important here; as lawyers we know what things mean, we know what words say, we know how to draft the words but we are innately a conservative group of people, even those of us who don't think we're conservative, because Law is an innately conservative discipline.

Does it have to be lawyers?

What is desperately needed in all of this debate about a new Ireland is IMAGINATION. Does anyone ask travellers what they would like; all the refugees and asylum seekers who have come to Ireland over the past 10 years, has anyone asked them what a new Ireland would look like?

International law won't get you anywhere, and where it does it pushes you into very conservative tendencies. Rather than have all expert led discussions, perhaps it's an opportunity to have a bit of imagination – actually talk to everybody.



## **PRESENTATION 2: WHAT HUMAN RIGHTS LAWS HAVE TO SAY ABOUT REFERENDUMS**

Prof Rory O'Connell, Transitional Justice Institute and Law School, Ulster University

### **Referendums and International Law**

This paper highlights the international law standards focusing on the conduct of referendums, drawing especially on Council of Europe sources and the UN's International Covenant on Civil and Political Rights.

There is an important point of discussion in relation to referendums, border polls and the people's right to self-determine. This people's right is found in the common article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). My focus though is more on the political participation rights which we find in article 25 ICCPR.

The paper considers what might be gleaned first from hard law standards at European and international level and then, more fruitfully perhaps from the soft law standards at European level.

First though the starting point for any human rights lawyer in these islands must be the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR).

### **Hard Law I The European Convention and European Court of Human Rights.**

A number of rights are relevant here or might be thought to be relevant. These include the core political rights of free expression and association, right to non-discrimination, and the right to free elections.

Turning to the latter the right to free elections is found in article 3 of the First Protocol to the ECHR (P1-3).

The text of this article suggests that it is primarily concerned with the obligation to hold free elections for the legislature. Indeed, at one point it was thought the article did not protect the right to vote or to run for election but simply created a duty to hold elections. The European Commission and Court of Human Rights have clarified that the article does include the individual right to vote and the individual right to run for election. The Court has also clarified that the rights apply to certain sub-national legislatures, including regional councils in Italy, and also to the supranational European Parliament.

The Court has however set its face against recognising the applicability of the article to referendums (or presidential elections).

This is despite being presented with two cases which furnished compelling arguments for a change, one from the UK, one from Turkey.

The UK case was *Moohan and Gillon v United Kingdom* App nos 22962/15 and 23345/15 (13 June 2017) and followed from a lengthy discussion of the issue in the UK's Supreme Court where the Supreme Court split 5-2 on whether referendums fell within the scope of P1-3. The applicants in Moohan were in prison having been convicted of murder; they sought a judicial review of the Franchise Act on a variety of grounds including compatibility with ECHR, EU law and common law principles. The 5-judge majority thought it was clear that the Convention did not apply to referendums in light of the jurisprudence from Strasbourg and the wording of P1-3.

Two judges – Lord Kerr and Wilson dissented. They disputed that the Strasbourg case law was as unequivocal as the majority thought, noting in particular the line in an earlier UK case (McLean) that there was nothing in the nature of that referendum which brought it within scope of P1-3. Lord Kerr noted that the independence referendum involved the choice of what entity should be the Scottish legislature.

In Strasbourg, the Court gave more consideration to the debate than it had hitherto. It indicated that the Court and Commission had been lapidary in their discussion precisely because the issue was clear-cut (paragraph 40)! The Court dismissed the suggestion that there was anything distinctive about a secession referendum – the institutions had after all considered EU accession referendums. The Court explained that the language in McLean was intended to cover the possibility that domestic legal language might describe a process as a referendum even though it fitted the description in P1-3.

(The Court also dismissed an argument that the issues fell under the heading of the right to free expression in Article 10. For the Court when it came to the right to vote, the provisions of P1-3 were *Lex specialis*.)

The Court unusually had to face this question again shortly afterwards in a case from Turkey. This presented perhaps the strongest argument for the Court to extend the scope of P1-3. The case concerned the Turkish referendum which sought to change radically the parliamentary system of Turkey - the omnibus amendments created a presidential system, allowed the president to be politically partisan and even the leader of a political party, allow the president to appoint vice presidents; there were also serious issues about the context in which the amendment was passed including the fact it was during a state of emergency and some members of one opposition party were in jail. The applicants alleged irregularities in the counting of the ballots. The referendum was approved by an even narrower majority than the Brexit referendum – 51.41% yes and 48.59 % against. The Venice Commission had issued a highly critical report on the proposed referendum.

In short if ever there was a situation where the Court might decide that a referendum process should be brought under the scrutiny of the Court this would likely be it. Nevertheless, the Court insisted that its settled case law and the clear wording of the provision precluded its application.

More recently the Court has again rejected a request to look at referendums in the context of the Catalan independence referendum, and refused to consider the application of P1-3 in the context of an effort by the certain members of the Catalan parliament to convene; the Strasbourg Court nevertheless found that P1-3 could not be applied, relying in part on the fact domestic Spanish institutions (the Constitutional Court) had suspended the relevant Catalan laws.

Given the steady line of jurisprudence, the ECtHR is unlikely to have anything to say about any Irish unity referendums. It is striking that the ECtHR has adopted an approach which is closely tied to the text on this question, even though it has adopted an evolving and effective interpretation approach on other questions and also even on P1-3.

The clarity of the ECtHR's approach makes it unlikely that it would be open to an indirect approach availing of the non-discrimination principle in Article 14. The non-discrimination principle in Article 14 only applies when a situation is within the ambit of a Convention right. Again, this is an area where the ECtHR has generally been somewhat creative but given the clarity of the point that referendums are not covered by P1-3 it is unlikely the Court would accept an Article 14 claim.

A much more plausible ECHR argument would be based on Protocol 12 which creates a free-standing non-discrimination right in respect of any right set forth by law, not just those in the ECHR. This free-standing right allows the Court to consider matters that otherwise it would not be able to. The most famous example of this is in the realm of political rights – in *Sejdic and Finci* the ECtHR considered discriminatory aspects of the voting system for the Presidency of Bosnia Herzegovina.

However, P12 does not apply to this issue. Ireland signed P12 in 2000 but has not yet ratified it so it is not binding as a matter of international law, never mind domestic law. The UK has not even signed P12 and has longstanding concerns about the scope of P12.

## **Hard Law II – the International Covenant on Civil and Political Rights**

Article 25 of the ICCPR is the UN's equivalent of P1-3. It is notable that this is phrased much more widely than P1-3 in many ways. In one problematic way it is textually narrow in that, unlike most of the ICCPR rights, it is expressly limited to citizens.

The Human Rights Committee has glossed this language in Article 25 in its own General Comment 25. GC25 makes it clear that referendums are covered by Article 25; relevant also to our discussions today is that GC 25 is quite strong in terms of requiring positive action to encourage everyone's effective enjoyment of their rights - so measures should be taken to overcome difficulties like illiteracy, language barriers, poverty and so forth (para 12).

Given the difference in language, the Committee has had little difficulty in deciding complaints about matters like presidential elections and referendums, though not many have come its way.

The Committee has had some occasion to comment on these issues in its jurisprudence. In *Gillot v France* (15 July 2002, HRC, Communication no. 932/2000), the Committee had to consider arrangements for certain referendums in New Caledonia under the Noumea Accords. France had adopted distinctive rules on the franchise for different votes in this process.

The 1998 referendum had a franchise requiring a ten-year residence. Subsequently for later referendums the franchise was amended to ensure that those persons concerned with New Caledonia had a vote. France identified a long list of criteria – being eligible to vote in the 1998 referendum for instance or being too young to vote but having been continuously resident since then.

Some 21 applicants argued the rules were discriminatory; they argued there was indirect discrimination against citizens of certain ethnicities.

Notably this did not apply to all voting exercises.

The Committee applied the test that any distinctions had to be objective and reasonable. It also needs to avoid indirect discrimination or justify indirect discrimination.

The Committee did take into consideration that this was part of a self-determination process relevant to article 1. The Committee could not consider a complaint as such under article 1. It also was notably reticent about defining what was a 'people' for the purposes of article 1.

The ICCPR therefore is more relevant in some ways than the ECHR – article 25 applies to referendums; there is also a role to be played by article 1, article 2, article 26. And the ICCPR is formally binding on both the UK and Ireland, though only Ireland has accepted the optional protocol allowing communications (individual complaints); the UK has not accepted the optional protocol.

### **Soft Law – the Council of Europe**

Despite the indifference of the European Court of Human Rights, the Council of Europe has devoted considerable attention to issues of referendums. In particular both the Parliamentary Assembly of the Council of Europe and the European Commission on Democracy through Law – more commonly called the Venice Commission – have adopted texts in relation to referendums. These do not have the status of legally binding international treaties.

In the early part of the 21st century both PACE and the Venice Commission adopted texts on referendums. These included the PACE's 2005 Recommendation 1704 on Referendums and the Venice Commission's Code of Good Practice on Referendums.

As you might imagine, since 2005 – a lot has happened in those fifteen years, especially in terms of referendums. Notably Ireland has had a number of referendums of which the most high profile have been on abortion and equal marriage; Ireland, along with Italy and Switzerland have the most nation-wide referendums of any established democracies. Of course, there have also been important examples of referendums in Turkey on presidential power, in Hungary and Switzerland in immigration, in Italy, the possibility of a referendum on constitutional reform in Russia and referendums in Scotland, Wales and two UK wide referendums on the voting system and Brexit.

This has led to the PACE issuing a report on updating the guidance and the Venice Commission is working on revising its Code of Practice. We are fortunate indeed to have Dr Alan Renwick in our audience who is one of the persons who advised the rapporteur for the PACE committee on the latest issues in relation to referendums.

There are a few issues which are striking about the guidance in the Code and the latest suggestions in the PACE report.



The PACE report suggests referendums should only be used where there is considerable public interest but in the context of a Border Poll that is hardly an issue.

The basic rules on the referendum should be set out in advance. The UK in fact has a law on Referendums but crucially the franchise is not specified – this can be argued out in relation to each referendum. This was a point of discussion in relation to Scotland and the Brexit referendum, and one might imagine if the Brexit referendum had a wider franchise including for instance the 3 million EU citizens in UK, the nearly 900000 UK citizens living in the EU and 16-17 year olds, we have no idea if the same result would have been achieved.

An important recommendation in the Code is that these rules should not be changed less than 12 months before the referendum; or if the rules are changed then the changed rule should not apply for at least 12 months. The Code and recent PACE report explicitly indicates the franchise should be set well in advance (paragraph 52).

The original code of practice notes on the franchise that nationality requirements may apply but ‘it would be advisable for foreigners to be allowed to vote in referendums after a certain period of residence’; residence requirements can be imposed but should not be more than six months; it is desirable to accord the vote to citizens abroad.

The latest PACE text draws on the UK’s Independent Commission on Referendums to suggest post-legislative referendums may be preferable; the PACE report suggests that if this is not possible then the solution may be a two-referendum plan (paragraph 42). The Code of Practice and revised PACE text clearly oppose turnout thresholds or quotas for approval. Anything other than a majority of voters plus one is problematic. While thresholds and quotas may be mechanisms to secure widespread support, there are more desirable approaches such as legislative scrutiny, citizen discussion, embedded in representative democracy, good quality of information, high levels of participation. There are two possible exceptions though – one is where national minorities are concerned and the other is in federal systems.

The revised text from the PACE committee highlights a number of issues where the Venice Commission is likely to need to consider specific guidance - this is especially in relation to digital and social media and the role of finance. Some of the recommendations may need careful consideration in an NI context – the PACE report invites the Venice Commission to consider calling for a ban on foreign donations for instance which is not an unproblematic suggestion in this jurisdiction.

The revised text from the PACE committee also emphasizes to a considerable degree the principle that referendums should be incorporated into a system of representative democracy and not used by the executive to bypass parliament.

The revised text - inspired by examples in Ireland, Canada, and elsewhere - stresses the need for 'discussion and deliberation'.

### **Concluding Thoughts**

In one sense international law – or at least the European Convention on Human Rights does not offer very much in the way of guidance. The European Court of Human Rights seems to have adopted the view 'don't talk to me of referendums'.

The ICCPR does offer binding law in this area but the level of detail is somewhat lacking and as noted only one of the two sovereign states has accepted the relevant complaints mechanism.

The Venice Commission and PACE offer rather more guidance and not least suggest the need to get thinking about the legal framework for any such referendum and to have it in place well before it becomes an issue. It might be worthwhile involving the Venice Commission indeed in giving its opinion on any such legislation or other preparations.

The main consideration though is that even the more detailed guidance available in soft law from the Council of Europe provides at best a framework rather than definite answers and in particular the necessarily abstract guidance is unlikely to cover some of the perhaps unique circumstances, dare I say particular circumstances of this jurisdiction.

## QUESTIONS AND ANSWERS

**Question 1.** On the franchise question: in the Irish context, would Northern Ireland resident Irish citizens be able to claim a vote in any Irish referendum? What prospect do you see for a successful complaint through the Optional Protocol in that context?

**Rory:** what about people for instance born in the Republic of Ireland or Britain, but living in Northern Ireland, do they get a vote?

The text of Art 25 itself starts with the citizen and that's the default position; section 3 takes it for granted you can have a citizenship or nationality qualification, but there is an argument for a resident's qualification rather than a nationality qualification. Both systems accept that you can impose residence qualifications, as well, subject to scrutiny. As we saw in the New Caledonian case, residence can be extremely long, though normally it shouldn't be; a code of good practice specifies a period of six months residence limit normally.

In terms of the possibility for complaints, I suspect that the Human Rights institutions accept residence requirements: someone resident in Northern Ireland but who identifies as Irish you would expect not to be able to vote in a referendum in the south because of residence requirements. Normally, in election disputes those residence requirements seem to be accepted.

There was a big case involving Greece in the European Court of Human Rights, and a debate over provision in the Greek constitution, which seemed to anticipate legislation to provide for the right to vote of non-resident citizens, where the Court of Human Rights ended up reversing itself. A chamber decided that that meant there should be legislation to provide effectively for the right to vote for non-resident Greek citizens. The grand chamber reversed that decision and reaffirmed the broader line of the case law to suggest those residence qualifications could be acceptable.

In Northern Ireland, to what extent does there need to be coordination between legislators in the two jurisdictions as to who can vote? It would be anomalous if an Irish citizen in the North could vote in both referendums, for instance, but other people would not be able to vote.

**Aoife:** on a pure public law point, one of the bigger questions is who has the right to self-determination in a territorial referendum. The GFA gives you an answer there – it is a very exclusionary right; it is the people in the territory, who have the right to self-determination, they have the right to vote. In territorial referendums there is a need to ask who are the people? You can see that in the Scottish referendum debates on Twitter, with people saying that everyone in the UK should be able to vote, not just Scotland.

Non constitutional referendum v. constitutional referendum: franchises should align; a non-constitutional referendum could happen in the republic; or alignment would mean breaking free of the wording in the GFA about who exactly has the right to self-determination.

Specificity of the idea of ‘the people’; a footnote in an Annex in the GFA is particularly narrow - specifically born here in NI, to a parent of someone born in NI, have to be resident in NI – these are the people who have the right to self-determination, and following that from an international law perspective, that is the group that has the franchise, the right to vote. The group that is given the right to self-determination is clearly defined in the GFA and is a highly exclusionary definition; in the south it is just ‘the people of Ireland’. The ‘people’ in the republic isn’t defined any further.

**Question 2.** The question of the equality of voting rights to residence, the ‘people of Northern Ireland’, and the EU and the Common Travel Area.

**Aoife:** ‘The people of Northern Ireland’ is an example of unintended consequences, having been originally annexed to the GFA, and then incorporated into subsequent documents. There has been an entrenchment of a definition that was never meant to be this kind of legalised definition.

Common Travel Area: there are constantly questions about this in parliament. It started off as a cure-all, with nebulous connotations, but now everything is being shoe-horned into it. We have ended up with two things that were never intended to have the hard law kind of status; the common travel area and ‘the people of Northern Ireland’ are increasingly calcified, restraining the choices people have, and the more they are used for purposes they were never intended for, the more problematic they are going to become. I think the Common Travel Area should be codified on a rights basis, because that was what both governments were claiming it was. The UK government have gone down the road of defining who are ‘the people’, so it is an extra status symbol and the Irish Government has acquiesced to the definition or at least have not protested, that you are going to give to the right people who fit a category, rather than a multiple island where everybody gets to access services.

**Rory:** many of these documents are decided during political processes, then we pick them apart years later, as lawyers, and subject them to forensic scrutiny they were never intended to bear.

For instance, the exclusion of British citizens from voting in Irish presidential elections and in Irish constitutional referendums. Is there scope to extend the franchise in the south to British citizens, to recognise that Irish citizens have had longstanding possibility to vote, to participate in all British referendums? Would that be something that, if not constitutionally required, might be confidence building measures in the context of the wider discussion?

If we go back to the issue of discrimination between different groups, either because of nationality or residence, and the requirement that there be objective and reasonable justification; that somebody not born in Northern Ireland may not vote, is that objective? Is it reasonable? If you were to look at the way the European Court of Human Rights looks at non-discrimination cases, it is fairly formalistic Aristotelian approach to equality; if these are different groups of people, so you can treat them differently, might be the easy answer for the European Court of Human Rights. Would the Human Rights Committee be willing to look at the wider context of Northern Ireland, the long history of the two countries that, for better or ill, have been closely involved and whether the ‘people of Northern Ireland’ should also include people born in the Republic of Ireland, and for that matter, people born in Britain who have longstanding connections to Northern Ireland? One would hope that the more purposive argument would be more successful than the formalist one.

**Question 3.** What’s the legal basis for concurrent referendums?

**Aoife:** it says ‘concurrent’; it implies that they’re at the same time, but that doesn’t necessarily mean they have to be exactly at the same time. You could ask what question is being asked at the same time; so you could have two different referendums on different kinds of questions first in both, asking different things, and then come together, to vote on the same thing, if you knew what that ultimately would look like, all together on the same day. When we have all being asked the same question, that’s when we would have to vote at the same time. Because, you would not want one vote to influence the other. If one side votes one way, and the other votes the other way, that has long term political ramification of feelings of hurt and disappointment.

**Question 4.** On the franchise, assuming that an agreement would be reached, is there a potential problem, in the run up to the actual vote, of processing new applications for citizenship (as happened in the 1995 referendum in Quebec)?

**Rory:** yes, and there is also the question of the Electoral Register; there have been longstanding criticisms of the Irish Electoral Register.

**Aoife:** and extending the vote to 16-year olds in Scotland took time. You’re talking at least a year to 18 months if you want to include 16-year olds.

**Question 5.** Underlying principles -need for citizens voters to know what they are voting on + inclusivity. Is it simplistic to think these principles can be applied to referendums in the context of the future state of Northern Ireland?

**Rory:** We tend to be fairly politicised in Northern Ireland and you can already see that all these issues will be debated in terms of our own local differences, and there is considerable scope for people to engage in gaming, or spoiling of all of these operations, even if intended with all the best faith in the world, in some parts. There was a border poll in Northern Ireland in 1973, when there was something like 98% support for retaining the Union with the UK, but that was in the context that nationalists / Catholics overwhelmingly boycotted that process. So, I think we can, and we should, and part of the purpose of today, think about how we can have consultation and deliberation, in the language of the PACE report. But I can see how some people may choose not to be involved in that or may adopt stances which undermine parts of it. We had an all island civic dialogue on Brexit, convened by the government in the south, and many unionist politicians did not respond to that civic dialogue. Of course, we have to have the principles, the learning from exercises in deliberation and consultation in other places, but my gut feeling is that it will be politicised and divisive, no matter what is done, and there is scope for gaming and spoiling.

**Aoife:** The Citizens Assembly was a very interesting process to watch, but it was very expert driven, and, this happens with referendums in the south all the time, it got obsessed with this idea of neutrality, and lawyers being able to give neutral interpretations of law etc. But politics and democracy are more important than law. When it's rights questions and specific, in vote like Repeal, while they are big important questions, they are specific, and people are clear about what they are voting for. The Irish model was a human rights-based referendum; it wasn't about potentially creating a whole new country. NI is a very politically aware place, and there is considerable scope for gaming, etc.



## **PANEL 2:** **REFLECTIONS ON THE CONVENTION** **AND ON THE REFERENDUMS**



*Chair:* **Dr Anne Smith**, School of Law and Transitional Justice Institute, Ulster University  
**Dr Conor O'Mahony**, Faculty of Law, University College Cork  
**Dr Jane Suiter**, Dublin City University, Director of the Institute for Future Media and Journalism (FuJo)

## **PRESENTATION 1: REFERENDUM CAMPAIGNS IRELAND**

Conor O'Mahony, Faculty of Law, University College Cork

I am going to speak on the one hand, about our experience of referendum campaigns in Ireland and particularly, the legal regulation of referendum campaigns and the dynamics they create, and the experience we have had of that; and try to project forward on how that might play out in the event that we have a border poll. Informing this is a chapter I have just read for a collection I am currently editing called Popular Sovereignty and Constitutional Change, which will be published by Routledge later this year. There is a very good chapter in that by David Kenny who has written about the idea of referendum culture in Ireland, and that is going to be a big theme in what I am going to talk about. We developed a certain culture, a certain way of doing things in referendums in Ireland, for good or for ill. It's not perfect, and I'm not claiming that, but nevertheless it is pretty embedded, and people have certain expectations and habits in a referendum context and so that informs how any border poll might progress. The other project I am involved with, and Aoife O'Donoghue has contributed to this, is co-hosting a blog series looking at issues around any possible border poll and Irish unification. There is a very good blog coming up by Oran Doyle, who is examining the issue of what question will be asked, and that again will be one of the themes I will be looking at.

So, we have a lot of referendums in Ireland; we have them at a rate of approximately one a year and we've been doing this for quite a long time. So, there are well-developed patterns and practice in how we do this; that has developed a certain equilibrium in how things operate and that applies to two main things I am going to touch on, one of which is information and the other is money.

When we talk about a border poll, and that requirement in the GFA for concurrent polls, it's important to bear in mind that information and money will flow fairly freely across borders. The border is a line on a map, but when it comes to information, when it comes to modern and traditional media, everybody in Ireland watches the BBC, Sky News and so on, and probably vice versa. So, that is one thing to be aware of. From a money point of view, and the possibility for money to influence voters and to influence a campaign, that is also something that will flow fairly freely.

So, we need to think fairly carefully about the fact that on the one hand, any vote that would be held in Ireland would carry certain expectations: that probably the usual way we deal with those issues would be the usual way we would deal with them in this. The risk of not doing this that way is that you would upset that equilibrium that has developed around how referendums are run in Ireland. That raises the question that if we are going to do things in our normal way, what does that mean up here? Because if you don't do them in a similar way in the North, does that potentially create an imbalance or risk of disruption in itself?

So first of all, the question of information arises in two ways; one of which is around voter education and the other is around regulation of media. So, if we start with voter education:

## **1. Voter Education**

Before we can get to the question of how information is to be provided to voters, we first need to decide on what the poll is about.

There is a very difficult decision to be made here:

- The simpler the question (e.g. United Ireland – Yes or No?), the more it lends itself to Brexit-style over-simplification, where people are voting to set off on a journey without knowing the ultimate destination. In the same way that the terms of Brexit probably needed to be sketched out in broad terms before people voted on it, the terms of reunification would also need to be sketched out in broad terms in advance of a Border Poll so that people understand roughly what they are voting for or against.
- This immediately raises a difficulty about who would be responsible for settling this broad outline detail. It could in theory be negotiated between the three governments, but this seems likely to be a fraught, drawn-out process. Some form of citizens' assembly may have an important role to play here, to de-couple the issue from party politics and allow for in-depth, non-partisan deliberation.
- Assuming this obstacle can be overcome (which might be assuming a lot), a further difficulty arises. The more constitutional details you pin down in advance, the more complex the proposal becomes, and the more difficult it would be to explain to the electorate. There might also be more scope and incentive for misinformation, in that there would be specific elements to the proposal that could be seized on and misrepresented in a way that is less possible when you are only voting on the broad principle, with the details to be worked out later. But on balance, having observed how Brexit played out, I am inclined to think that these challenges are prices worth paying for avoiding the fallacy of asking people to vote on a completely opaque proposal.

So, if you proceed with a poll that offers a choice between maintaining the status quo, or pursuing a particular model of reunification, the next question is how to meet the challenge of educating the electorate on both parts of the island.

We have had considerable experience south of the border of the Referendum Commission as an independent and objective body charged with raising awareness of the fact that a referendum is being held, and of the issues up for determination. It has not been perfect by any means – persistent issues have arisen around being afforded inadequate time and resources to do its work. On occasion, some political actors have questioned the impartiality of some of the information provided – e.g. Brendan Howlin in the Oireachtas Inquiries referendum; *Doherty v RefCom* (although these criticisms have generally been rejected, including by the courts). Also, its mandate to provide neutral information has meant that the content produced has sometimes been dull and uninteresting.

As against this, it is now a settled and trusted feature of referendums in Ireland. Some of its chairpersons have taken a more active role in answering questions and responding to misinformation in addition to providing neutral set-pieces, which has been well received. It has become a feature of the referendum landscape here for over 20 years and the public would expect to see it active in a Border Poll situation.

I would argue that there should be a Referendum Commission or equivalent body; and it should be a single body with responsibility for voter education on both sides of the border, so as to avoid duplication and possible contradiction or confusion. But if this approach were taken, then – mindful of the importance of the Commission being perceived as entirely impartial – it might be better for it to be a distinct, ad hoc body, drawing on the experience of the Irish RefCom, but chaired perhaps by an independent person from outside of Ireland who would be an “honest broker” agreed between political leaders on all sides in advance. Otherwise, it might be all too easy to portray the Commission as being biased in favour of a particular outcome in the way that the Government campaign challenged in *McCrystal* was found to be. The Commission would need to be given a lengthy run-in period to do its work, gradually ramping up the intensity as the poll drew closer, and it would need to be given considerable resources to prepare documentation, online materials, advertisements, and perhaps even public events. It should also follow the lead of Mr Justice Kevin Cross from the marriage referendum and take a proactive role in engaging with significant claims made by campaign groups which misrepresent the proposal.

## 2. Media Regulation

As with the Referendum Commission, an accepted part of how referendums south of the border have operated is the fact that broadcast media are under an obligation to cover the campaign in a manner that is fair to all interests concerned, and to present the broadcast matter in an objective and impartial manner without any expression of the broadcaster's own views. Political advertising is prohibited. A moratorium is imposed on broadcast coverage from noon on the day before the poll, to allow for a period of reflection among voters.

Again, this arrangement is not without its flaws: for example, there is no regulation whatsoever of print or digital media, even though the boundaries between traditional television and radio and online content are becoming increasingly fluid, and the way in which people consume media has changed enormously. Television and radio remain highly influential, but far less than they were.

Equally, the manner of its implementation has been problematic ever since the judgment in the Coughlan case; many broadcasters have resorted to a rigid and sometimes slavish application of "equal time" and a stopwatch approach, even though the Broadcasting Commission have clarified that there are multiple ways in which a fair and balanced approach can be achieved. So, there is room for debate about how these rules and their implementation can be improved upon. However, as they are part of the referendum culture south of the border, they cannot realistically be abandoned altogether.



The more challenging question would be how to operate consistent rules in both parts of the island. Since media is consumed without geographic restrictions, it would make no sense to regulate the media in one way in Northern Ireland and in another way in the south. There would have to be an agreed position across the whole island – and ideally in mainland UK as well, since BBC, Sky etc are routinely consumed across Ireland, north and south. If these channels were not regulated, but Irish broadcasters were, it would create an imbalance in the entire process.

But how would you make this work? Would it necessitate primary legislation in the UK, or would existing legislation be sufficient? And even if this was dealt with, might there be difficulties in harmonising implementation, particularly since UK broadcasters are less experienced in referendum coverage? How might it impact on the legitimacy of the process if UK broadcasters were seen to be leaning towards a No vote by giving more coverage to the No arguments and claims, or giving a harder time to those arguing for a Yes vote?

### **3. Funding**

The third main bone of contention that has arisen in the regulation of Irish referendum campaigns is the issue of campaign finance. On the state side, the position is reasonably settled: the State may not use funds to advocate for an outcome on just one side. It must either refrain from directly using public funds for campaign purposes, or allocate funds equally on both sides (the former is the preferred approach, with the latter never having been tried to date). Intentional and overt campaigning on one side using public funds has been found to breach this rule, as has unintentional or disguised bias in the provision of supposedly neutral and objective information.

There are some aspects which are less clear; for example, the case law states that certain direct use of state funding (such as a Minister using state transport to attend a campaign event) will not breach the principle. Even less clear is the position relating to indirect funding, such as general funding provided to political parties or civil society groups who campaign for a particular outcome. Finally, the rule has only been applied to the campaign period proper (i.e. when the referendum is formally called) and has not been applied to the pre-campaign period (which may be important in long, drawn-out debates leading up to the actual campaign). However, to date, none of these issues has been litigated.



The principle that state funds should not be used in a partisan way is again a settled feature of referendum culture in Ireland, and has been directly endorsed by the Venice Commission as best practice in referendums. So, it would be reasonable to expect it to apply in a border poll scenario; and as with the broadcasting regulations, it would be reasonable to expect it to apply to Whitehall as well as Stormont. The arrangements for this would need to be worked out – whether legal or non-legal, and what level of detail would be provided on the issues in the grey area above. As before, the aim should be for a degree of harmony between the jurisdictions, and this may create practical challenges along the way.

Private funds are, if anything, even more complicated – not least because to date, Ireland and the UK have taken completely different approaches to this issue. Ireland has limited donations for political purposes but allowed parties and civil society groups to spend as much as they can raise within the limits prescribing what can be donated by individuals and corporations. Private individuals have been free to spend as much as they like in a private capacity; in such a historic vote, this may prove particularly problematic.

The UK has taken the opposite approach of limited spending rather than donations. For example, in the Scottish independence referendum, there was no limit imposed on the donations that could be accepted, but lead campaign groups had a spending limit of £1.5 million, while political parties and smaller groups had separate, lower limits. A study of 25 OECD countries has shown that spending limits are more common than limits on donations. However, they have proven difficult to implement in practice in the UK, and controversy is ongoing in relation to breach of these rules by the Leave side during the Brexit campaign.

A key issue to be resolved in any border poll, therefore, would be whether to regulate the spending of private funds separately in each jurisdiction, or to take a harmonised approach; and if the latter, which approach to adopt? There is no obvious answer to this dilemma.

Finally, one of the main ways in which private funds are channelled nowadays is into advertising on social media and other online outlets. At present, this is completely unregulated in Ireland – I am not familiar with the exact position in the UK. Whatever it is, it would again seem important that an agreed and harmonised position could be arrived at, and ideally not one that goes for minimal or no regulation, since the scope for outside interference and abuse would be enormous. This is no small task and would likely require considerable groundwork and negotiation in advance of any border poll.

## **PRESENTATION 2: IRELAND: REFLECTIONS ON THE CONVENTION AND THE REFERENDUMS**

Dr Jane Suiter, Dublin City University, Associate Professor, School of Communications

<p><b>Deliberating Constitutional Futures</b></p> <p><b>Ireland – Reflections on the Convention and on the Referendums</b></p> <p>Jane Suiter 18 February 2020 Belfast Campus, Ulster University</p>	
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I am going to be talking about deliberation and the Irish referendums, rather than the media and social media environment. I want to talk about three constitutional reviews in Ireland.

<p><b>Constitutional Convention (2012-14)</b></p> <p><b>Citizens' Assembly (2016-18) (2019-20)</b></p>	
	

The first Irish Constitutional Convention began in 2012 so we have nearly 8 years of these kinds of assemblies using deliberation in advance of referendums. Some of it is good, and bad, but it provides a lot of lessons and food for thought for anybody considering border polls. The most interesting thing about the first Convention is it brings together politicians and randomly selected citizens. The idea is to have a broad range of people, of interests and crucially have citizens involved who aren't usually involved in these things, people who don't usually turn up to town hall meetings or even to tennis or rugby clubs.



The first Convention covered a wide range of issues, the best-known being Marriage Equality that led to the Marriage Equality referendum. But there was a large number of recommendations presented to parliament and some of them were roundly ignored.

## Irish Citizens' Assembly, 2016-18; 2019-20



### Members

99 citizens

### Agenda

2016-2018  
Abortion  
Climate Change  
Aging Population  
Fixed-Term Parliaments  
  
2020  
Gender Equality

### Outcomes

44 recommendations  
presented to Parliament

The second Irish Citizen's Assembly was made up of 99 citizens, so there were no politicians involved in this, and that does lead to a slightly different dynamic although we do have research to show involving the politicians didn't actually lead to the elite capture that would have been predicted and that we ourselves were fearful of before the first one. This second assembly discussed abortion, but also climate change, ageing society and fixed term parliaments. One interesting aspect is the link back to the representative system, a feature which is often ignored. In the cases of both abortion and climate change the Oireachtas set up special parliamentary committees, to consider the reports of the Citizens; thus in both of those instances, the politicians debated the report from the assembly. They called a lot of the same witnesses, a lot of the same experts. They heard a little bit less of the ordinary person's testimony, which was a large part of the Assembly, listening to people's lived experience as well as listening to experts.

The third assembly is the current one which is examining gender equality, and again there was the testimony of experts, and also people's lived experiences, so for example, single fathers who had been impacted, lesbian mothers, and so on.

The motivation behind the introduction of this kind of deliberative democracy was an effort to rebuild legitimacy and trust between the government and the people, post the imposition of austerity in the 2008 – 2011 period. A group of political scientists had run an experimental citizen's assembly, We the Citizens, which informed some of the initial design choices. Interestingly, Alan Renwick ran one on Brexit as well, in London. Thus, Brexit is an issue that has been part of a citizen's assembly, which I think might be an interesting thing to think about.

## Deliberative Democracy

**Building and engaging with authentic reasoned debate; ie inclusive and consequential**

**“a cognitive process in which individuals form, alter, or reinforce their opinions as they weigh evidence and arguments from various points of view,” (Lindeman, 2002, p. 199, quoted in Delli Carpini, Cook & Jacobs, 2004).**

The idea is not that people will change their minds, but that they will engage with evidence. I think is very important given the hyper media environment we are in at the moment, an environment where it's not even which facts, but even the mere presence of facts, which is often contested in the public discourse. So, it is an environment where we can say there is expertise, there are some facts that we can lay claim to. There is actually some evidence that we can consider.

## Deliberation...

... is argumentative (epistemic vigilance), i.e., it is to enable individuals to argue with each other given they do not blindly trust what others say (Sperber, 2000, 2001)

Reasons in order to find and evaluate arguments so as to convince others and be convinced when it is appropriate (Mercier & Sperber, 2009).

Seeks solutions beyond adversarial politics; seek to identify common ground; foster constructive thinking about solutions (ie not just protest); fostering losers' consent

It is actually argumentative, and I think that is really important, but the difference between the kind of argument that is privileged within deliberation is very different from the kind of deliberation that is privileged within a court of law, or within a debating society. The idea is to present the arguments, but it is as equally important to be persuaded as to persuade. The point is not to be there to persuade others of your own argument; the point is to listen to the arguments and be open to being persuaded as well as to persuade. So, it is a very different kind of deliberation to that which we find in elite institutions, such as parliaments and so on, where the point is nearly always to persuade. And the point as well is to try and find solutions beyond adversarial politics. I think this is particularly important in a referendum environment, which we know always facilitates the binary; it's nearly always a yes or a no within a referendum. So the point is to try and look beyond that binary type of solution, to look beyond the adversarial protest and to think about fostering solutions. And it's important that it's also about "losers' consent"; so it's not just about the majoritarian decision, and be damned the losers, the kind of thing we saw in the Brexit debates, with what happened to the 48% after that referendum result. It's about trying to be inclusive. Now of course it doesn't always achieve all of this, but these are the normative principles in the deliberative democracy literature.



## Referendums in a Deliberative System I

**Referendums seem to embody everything that deliberative democrats set their faces against: agenda manipulation; brute majoritarianism; symbolic battles instead of reasoned dialogue...**

**Direct democracy's aggregative aspects prevent it from being a particularly good arrangement for deliberation (Cohen 1989:30).**

Referendums are almost an antithesis to this; referendums privilege a very binary debate; referendums almost facilitate agenda manipulations. As we heard earlier, the minority might be the political elite attempting to manipulate the agenda in their own interests, and so on. Referendums facilitate symbolic battles, and in this way are often about the language of the street. Brexit is really interesting in this regard, because you can really see the language that won, the language of Leave, was actually the language of the street, the language of people, while the language of remain was mired in the language of expertise, and experts. So, one of the ideas of deliberation is that you bring that expertise to the people but the language that comes out of it can actually be the language that ordinary people speak because it has been mediated through ordinary citizens, randomly selected citizens, which intervenes and mediates it in a different way.

There is a new branch of deliberative literature that talks about this possibility of marrying these parallel streams of deliberative democracy and direct democracy. Rather than pitting them against one another, which is what the literature would traditionally have done.





## Referendums in a Deliberative System II

**BUT an emerging branch of literature argues that direct and deliberative democracy can be mutually supportive (el-Wakil, 2017, Parkinson 2020)**

**New, parallel deliberative institutions can inject more deliberation into the process**

**Referendums can play constructive roles**

**as legitimating tools; injecting representative and reflective legitimacy (“people like me”) with ordinary speech**

**Improving the information eco system**

**Promoting greater other regarding behavior**

The focus now is on the question of whether deliberative democracy might help us counter some of the worst pathologies of direct democracy. One of the interesting questions is the interaction of deliberation and referendums; whether the interaction of deliberative and direct democracy can be about increasing representative legitimacy, increasing reflective legitimacy. Separate to that is the question of improving the information ecosphere which we know can be easily manipulated in referendum campaigns. And of course in the kind of environment we are talking about at the moment, there are also questions around the affordances of the social media platforms. In particular, advertising isn't regulated, never mind the actual content that's platformed on social media. Deliberation offers the possibility of having an informational space, which is based on evidence, based on argument, where we can see the contested facts, and the different arguments.

Some of the research we are still working on, on the abortion referendum for example, looked at the media debates afterwards and looked at when advocates from either side might make claims based on evidence that was found to be contested within the assembly, the journalists were actually able to use that evidence to stop it spreading within the broadcast debates, and so on.

And the third really important feature we have found with this marriage of the deliberative with direct democracy is promoting other regarding behaviour, in other words, promoting empathy between people. Because the deliberative democracy strand privileges ordinary voices and lived experience, where people get to stand up and tell their fellow citizens what the impact of this legislation or this constitutional provision has had on them and their lives and their children's lives. That's something that the citizens react to, that they take on board. We have done some studies looking at whether these deliberative precursors to a referendum enhance subjective and objective knowledge, and we looked at the children's referendum, the marriage equality referendum and the abortion referendum:

## Enhancing subjective and objective knowledge?

**Integrating citizen deliberation structures into the pre-referendum phase may deliver systematic improvements in democratic outcomes.**

**Ultimately we argue that deliberative processes enhance subjective and objective knowledge and this leads to referendum outcomes where a larger share of voters cast ballots which align with their own fundamental values.**



## Two papers

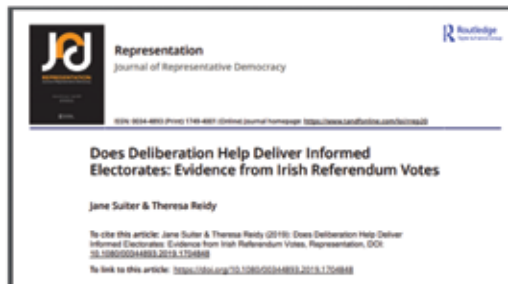
### Scaling up Deliberation: Testing the Potential of Mini-Publics to Enhance the Deliberative Capacity of Citizens

Jane Suiter (Dublin City University)

Lala Muradova (Katholieke Universiteit Leuven)

John Gastil (Penn State University)

David M. Farrell (University College Dublin)



## Scaling up the Benefits: Findings I

This experimental paper tests the possibility of embedding the benefits of minipublic deliberation within a wider voting public.

1. non-participating citizens who are exposed to information about the minipublic and its findings, gain significant increases in knowledge
2. exposing people to statements in favour and against the policy measure in addition to information about a minipublic and its findings increases their empathy for the other side and fosters losers' consent

## Scaling up the Benefits: Findings II

1. the Constitutional Convention at the marriage referendum and the Citizens' Assembly at the abortion referendum mattered by enhancing the quality of vote choice.
2. They delivered greater levels of knowledge and understanding of the key issues being decided and more voters were able to cast ballots which were fundamentally in line with their core values.
3. However, we also found that some voters, particularly No voters, cast ballots out of sync with their values, likely when they focussed on the complexity involved in policy choice.
4. From a normative standpoint, the results are encouraging.

So we can say from our papers, in terms of scaling up, the deliberative phases mattered by enhancing the quality of the vote at those referendums. People were voting with greater knowledge, both objective and subjective; they were voting with greater empathy, and it helped increase the correct voting, in the political science terminology, which is where people are actually voting in line with their own values, rather than voting sometimes on matters that are outside of these. While there are other things we can discuss, from a normative point of view, the evidence of having deliberative precursors to a referendum is encouraging.

## QUESTIONS AND ANSWERS

**Question 1.** The question of conducting the referendum north and south, and constitutional and political culture; is it possible to coordinate referendums north and south, if the political cultures are fundamentally different? Are the constitutional and political structures and culture really sufficiently similar to allow that kind of coordination to take place?

**Conor:** I think it is one of the fundamental challenges in this whole process; I'm not going to give an answer to that question, because I can't claim to know enough about Northern Ireland to speak to the culture here, although my gut instinct is that you're right, they are very different cultures. On that question on consensus in the south, one of the things about the referendums process, and I think this has been enhanced to a degree by the use of a Citizens Assembly, is the idea of 'losers' consent'. Losers' consent was there previously, to an extent anyway, because we have a lot of referendums and because people get to have a direct say, and the campaign process has constraints built into it, designed to avoid significant imbalance in that process, there's probably always been a sense that people are willing to accept the result if there is the satisfaction of a fair fight. Referendums in the south over the years have given losers the satisfaction of a fair fight. Take the Divorce Referendum in 1995; it passed by less than 1%, in a context where there was significant controversy both about use of funds on the Yes side leading to the McKenna judgement, and imbalance in the broadcast time leading to the Coughlin judgement. And yet ultimately the No side, having litigated it and lost, accepted the result. So, there is something about that sense that people feel, "well we get to disagree, but this is ultimately how we resolve the disagreement; and so we accept that".

If we say that the political cultures are too different, do we do it differently? Or do we see if we need to try and converge a little bit if it's going to be a concurrent referendum? If we do it completely differently in each jurisdiction, then you get spill over; how it gets done in one jurisdiction affects the equilibrium of how it gets done in the other. At the moment I think we should explore how we can address that challenge, rather than throwing our hands up in the air and saying it can't be done.

**Jane:** I think one of the most important things about thinking about ways you can allow people have their say, is that the deliberative process allows that. You bring people in and it's inclusive; they're listened to, respected and not shouted down. One of the things that is most often said to me, especially by older people, and more especially by older women, is "nobody has ever listened to me before" when they've come out of one of these assemblies. The deliberation allows people the space to actually be listened to. I think that ultimately, the British, Irish and Northern Irish cultures aren't really all that different. Just look at Brexit and how contested that was, and yet ultimately there's the consent of Remainers.

**Question 2.** There's no losers' consent here or in GB, so what is the approach we should adopt? Is there a need for separate different structures for the conduct of the referendum?

**Conor:** If you were to go for a kind of ad hoc advisory referendum in the south for example, then in principle it doesn't have to be done in the same way. For example, if it's a referendum to amend the Irish Constitution, there are all sorts of legal requirements. There are Supreme Court decisions and legislation which regulate how that is conducted. Whereas if it's an ad hoc advisory 'do you want a United Ireland or not, and we work out the details later' then you can loosen those rules and you can say, "it's not the same as any one we've ever had so we can do it in a different ad hoc way for this particular process". So that's one way of doing it. That comes with a downside that it starts to look like Brexit: that you're voting on something when you don't know what the final product is going to look like. I'm not sure how you resolve that; there's a big downside whichever way you do it. But the reality is that it's built in to the GFA, it's built into the way we do things in Ireland; direct democracy is ultimately where this question gets resolved. And so, whichever model you go for, there's a big challenge built into that. So, do you go for the idea of two referendums? Do you have the initial one first, in your two different ways, on the basic principle; then do you hammer out the detail and then have another referendum, in a more convergent way? For me, there's a big struggle as to how do you make all this work? Because with all the models, I can just see landmines all over the place.

On the losers' consent, in Northern Ireland if there was a 50% +1, it's difficult to see what consent looks like.

**Eilish Rooney:** In the Transitional Justice Institute a few years ago, we designed a Transitional Justice Grassroots Toolkit that raised difficult issues in the transition here that is ongoing. Organising with one small local group, the Bridge of Hope, we entered into conversations that involved around 500 people, about very difficult issues. The conversations were well-structured, you could say it was deliberative. What we found was that people were willing to listen; they weren't in conversations that led to decisions being taken; those conversations weren't like that. But deliberative conversations about a border poll or constitutional matters in the north, in my limited experience, have been met with a willingness to engage. Women's organisations have been very willing to engage; and it doesn't mean they agree and that's not the objective of the conversation, to get agreement at the end of it, but it is the objective of the conversation to articulate positions and to have your say, and sometimes to have your say in a way that can't be tracked back to you. But my experience has not been that the difference in culture is so radically different that people would not engage in a deliberative exchange.



**Aoife:** The Feminist Judgement Project was an overtly feminist deliberative discussion, in which people were willing to engage. On Article 41 of the Irish Constitution, which includes two very different perspectives on women's place in the home, people were very willing to engage. We have done some work in Northern Ireland as well, in the Feminist Judgement Project, and there wasn't this massive cultural difference.

In relation to losers' consent; we wouldn't have Repealed the 8th, if there had been losers' consent. There wasn't losers' consent; people campaigned, for a very long time to remove it, and that is really important. I do think people should keep fighting, and that is what democracy is for. Democracy means that people do keep fighting for what they think is right. It's important not to valorise the consensual, because consensus can also take away democracy, it can take away that idea of people contesting, getting involved and voting, having campaigns and you can't delegitimise a campaign because you say we've had losers' consent, even if it's people I don't agree with.

**Question 3.** Most people I speak to think a deliberative assembly to discuss the future of Northern Ireland would be desirable if it could be made to work. But most people I speak to are sceptical it can be made to work. What kind of process would you need to get a representative sample of people in the room to discuss Northern Ireland's future, and then how the work of a Citizens' Assembly is then treated in the wider political system can be problematic? Would politicians and the media accept and respect it, and treat it seriously? What can be done to make it easier at some point in the future for that kind of deliberative discussion on this most contested issue, to take place? Eilish has spoken about some forms of conversations; what about the provision in the New Decade New Approach, for citizen engagement, including an annual citizens assembly? Is there a way of using that in developing an understanding and acceptance of that model, as a way of doing politics?

**Jane:** Our understanding of losers' consent is that people are willing to abide by the law, not that they were never going to campaign against it again, nor that they accepted it for the rest of their lives. People accept the decision, and that the outcome reflected the majority position, even when people were pro-life, and they continued to campaign against it. Was the referendum legitimate? Yes, they were consenting to the legitimacy of the process; they were not guaranteeing that they were never going to fight against the issue.

Representative sample of the people in the room? It might be interesting to have initial processes around the different communities, for example, bring in people with unionist views and talk to them in a deliberative way, listen to them and really hear what their issues are before you would push it to the more challenging conversation about constitutional futures?

How it's treated in the political and media environment in the north is related to that; that would depend on where it came from, but I think the media would report in reasonably good faith what happened.

**Question 4.** Mechanisms of the citizens' assembly – how was it able to maintain its autonomy in the face of any kind of political interference?

**Jane:** the crucial thing I think was that the people in the Citizens forums were self-selected. They volunteered to go along, so you get a very different kind of person volunteering to go to these things, than if you randomly select by knocking on people's doors and asking people to turn up. So, the composition is different, and what goes on inside them is different when it's randomly selected v. self-selected. The practice in Ireland has been to not allow anybody into the room who has actively campaigned on either side, so if you've been part of an interest group or a campaign group, that's campaigned on this, that excludes you from being able to be a member. There's pros and cons to that but that was how it was dealt with, especially with the abortion issue. The second thing is facilitation; so, when you're at the round tables in the rooms, it's absolutely vital to have strong facilitation; and where voices aren't privileged and every member is encouraged to speak up, and you keep track of that and so on. And again, that changes how the whole thing works, but of course it's not perfect and even by the selection of those who are going to give evidence, that's one way for lead interests to impose solutions they want so not completely divorced from the political system but I think it's something you have to be really aware of and put in whatever measures you can to act against it.

### **PANEL 3:** **SCOTLAND AND WALES**



*Chair:* **Ciaran White**, School of Law, Ulster University

**Dr Silvia Suteu**, Faculty of Law, University College London

**Prof Richard Wyn Jones**, Director of Cardiff University's Wales Governance  
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# PRESENTATION 1: THE REFERENDUM EXPERIENCE IN SCOTLAND

Dr Silvia Suteu, Faculty of Laws, University College London



## The referendum experience in Scotland

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18 February 2020

What I am going to do today is reflect on the Scottish independence referendum experience, the process running up to the 2014 vote, and then to include some outstanding questions or issues that might not have been resolved and might come up in a border poll, and as we have seen in the Brexit referendum, have come up in that instance.

### Initial questions



- Should the question of independence be settled by a referendum?
- Can referendums be truly deliberative?
- What makes a referendum outcome *be perceived to be* legitimate?

The importance of procedural legitimacy

Some initial questions to get us reflecting on the Scottish experience. Was the referendum actually a good idea in terms of settling an independence question? It's not really a straightforward answer that we find when we look comparatively, and the reasons for that, these have been raised earlier, are it's too much of a black and white mechanism, its potential actually to polarise rather than solve issues etc., although in the Scottish instance I think it was the right mechanism precisely because of its bluntness, so sometimes that actually works in favour of the referendum mechanism itself because independence questions might be precisely the type of questions best solved by such a mass participatory mechanism that does produce a blunt result. Then whether that result is seen as legitimate is a slightly separate question.

A related question, that came up before, can referendums themselves be seen as deliberative?

## Indyref 2014: deliberative credentials



- Elite control syndrome in check
- Inclusiveness
- The referendum question (and process for setting it)
- Campaign length and quality
- Campaign regulation
- Turnout & losers' consent (?)

Going back to critiques of referendums as a mechanism, as a tool, the argument might go that they are too prone to elite control. So not just that they are majoritarian blunt tools, but they are too easily manipulated by elites, often politicians, or nefarious elites in society, or indeed outside. And while that may be true, I think there are ways to tame this; so for example if the process is designed in such a way as to ensure collaboration between different branches of power, by intergovernmental agreement, as was the case in Scotland and the London based authorities there are ways to mitigate that potential for elite control. And you might say that all political positions are prone to such control, and actually there is an argument to be made that referendums can reclaim their radical democratic potential, so referendums can act against that elite control, to mitigate it, when it might exist otherwise.

Another objection from the deliberative side is that you just can't scale deliberation upwards; it only works in micro settings; it doesn't really work at a societal level. It's a question of size and citizen's ability to engage, learn and reflect, to potentially change their minds so that a mass referendum campaign can only ever be perhaps participatory but not really deliberative. But, from the work that has been done on this, it is often a problem of how you design the process, rather than a principled objection that deliberative democrats raise. I tend to agree with that myself and think especially when linked with other sites of deliberation in society, referendums can promote deliberation more widely.



David Cameron, Michael Moore, Nicola Sturgeon and Alex Salmond at the signing of the Edinburgh Agreement on October 15, 2012. Source: *The Herald*



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There is also a question of what would make a referendum outcome perceived to be legitimate, and the emphasis on process, that I'll detail later on, would have us believe that legitimacy is what matters and there is certainly truth to that. We've heard about losers' consent and how that might be achieved, and certainly a fair process that is also perceived to have been fair, so giving the losing side a chance to fight that battle, is quite important. But I think, certainly in the UK context, there is a paradox. On the one hand you have referendums that require quite a bit of clarity about the predictability of the process, but that doesn't square neatly with the UK Constitution, not just because it's uncoded but because it emphasises ambiguity, flexibility, and often prefers political processes rather than direct participation from citizens in decision making. So, one of the points that I'll emphasise at the end is that I think that interplay worked out well in the Scottish case, but it may not necessarily be easily replicated elsewhere, including here, for different reasons.

Coming to the Northern Irish context, Cass Sunstein talks about the law of group polarisation and how difficult it is to avoid in polarised contexts, to avoid only leading to more polarisation, and further retrenchment of divided views. So opening up the question may not lead to consensus, or a reasoned final decision, but just further polarisation. And people like John Dryzek have written on the promise of deliberative democracy in divided societies, arguing that you need to decouple deliberation from decision making in such contexts, to take off the pressure of the decision from the deliberation in that forum, which frees you up to do things differently, to reflect and to change your mind and engage with your peers. Now, a referendum seems not to be doing that, so what can we learn from Scotland and how it ran its Indyref in 2014, and before, and what lessons can we learn from that?

There are a few things that are typically listed as reasons why Indyref worked and avoided associated problems of deliberation and participation.

The question of elite control is said to have been kept in check primarily because of the initial cooperation between Scottish institutions and their London counterparts; a political agreement that was reached in 2012 set in motion a process, backed by political goodwill.

Inclusiveness: we have already heard about the franchise being opened to younger people. Some of the research that I have done looked at whether the referendum campaign actually reached women voters as well. Certainly in the early stages of the campaign, women were seen to have been comparatively less engaged and forgotten by both campaigns. Then, as the polls were narrowing, and the campaigns realised that women could swing this, they refocused their advertising and the marketing materials to women and that gap between women voters and male voters narrowed.

Other things that made the referendum more successful: the clarity of the referendum question, but also the process in which it was set. So, very early on, and from the Edinburgh Agreement as well, it was agreed that it would be a binary question rather than a multiple choice question. So the Devo-Max question would not be on the ballot. There is some argument as to whether it ended up being on the ballot anyway, because that's what many people ended up voting on, even when they voted no. But the fact that the Scottish government even though it didn't have to, chose to involve the Electoral Commission in setting the question, having the clarity of its question checked, and engaging in a transparent process, designed to come up with the clearest possible question, was seen as a plus of that process. There are also some questions though, as to how much clarity you can actually get on the question of independence, in so far as the question put to the people was "do you want Scotland to become independent?" yes/no; that might be clear, but what independence actually meant was far less clear. The indyref campaign did not provide a final answer to that because it was just not possible to do so. This would have to be negotiated following the referendum.

Other aspects: the campaign's length and quality; so depending on where you start, from the start of the campaign and the Edinburgh agreement in 2012, that gave the campaigns two years to design the legal process, set in place a regulatory framework. Once the date was set, it was also fixed, which was important and differed for example from the Quebec experience when the date was changed, and contraversially so, because it was perceived as the political authorities trying to mess with the outcome. Or you could view the campaign as actually going much further back than that, to the 2011 elections, the SNP had in its manifesto very clearly that it wanted to pursue the case for independence, or you could even view it as going back decades since the independence question was there. Also, the question of losers' consent was less intractable in so far as the turnout was high, almost 85%, and the vote was clear in favour of 'no', with a 10% margin between the two sides. If we define losers' consent as accepting that the issue has been settled, then clearly it hasn't been the case. If we think of losers' consent as accepting the process was fair, and that particular decision in 2014 was legitimate and procedurally fair, then I think the answer should be more positive. [This photo may bring back memories, but illustrates the political impetus for starting the campaign in 2012.]



The Scottish flag flies among other flags, including Ulster Banners on either side, in a street in East Belfast, Northern Ireland, July 2014. Source: Cathal McNaughton/Reuters

One of the interesting lessons of the Indyref 2014 is to see just how much of the legislative process was relatively uncontroversial.

## Indyref 2014: regulatory framework



- **Edinburgh Agreement 2012 & s30 Order**
  - Role of Electoral Commission
- **PPERA 2000**
- **Scottish Independence Referendum Act 2013**
  - Referendum period (16w) and purdah (28d)
  - Campaign funding and spending rules
- **Scottish Independence Referendum (Franchise) Act 2013**
  - Expanded franchise to 16 and 17 year olds

So, you had the Edinburgh Agreement, you had the Section 30 Order from the UK Government itself; these gave the Electoral Commission a role to play in the process. It's interesting to note how much the Scottish government followed the rules and prepared the political parties for the Referendum Act. So for example, the role of the Electoral Commission was part of the Edinburgh Agreement, but it also followed the Political Parties, Elections and Referendums Act 2000 (PPERA) where it didn't have to, so for example, including the Electoral Commission in setting the question. And it also departed from PPERA, where it reflected on, for example, Welsh experience with campaign designation and where PPERA was seen not to be fit for purpose. So there was an informed approach in setting out the legislative and regulatory framework. In terms of the referendum period and purdah period running up to the actual vote, these were more or less in line with PPERA rules and designed to make sure that the statutory limits on campaign spending in particular would apply, 16 weeks ahead of the vote, and in the purdah period (28 days before the vote) when campaign promotional material was not meant to be distributed by public authorities. Campaign and spending rules were very important, with the Electoral Commission overseeing the application of these rules. Importantly also, designing quite detailed reportings as well. And perhaps surprisingly, coming out of this, is that the campaigns seem to have followed the rules themselves. There were some reporting issues resulting in a few thousand pounds at most fines, and not criminal sanctions as far as I know. The overall spending did go over by about £2m, but the Scottish Government argued this was on account of the higher than expected turnout.





Below is an extract from an information booklet, distribute by the Electoral Commission. So, on the question of whether people were informed when casting their vote, because of the widespread deliberations, physical and online, but if you look at the information material that the Electoral Commission itself produced, you had it struggling with its neutrality requirements. So what it ended up doing in this booklet, was including, in its answer to the question “what is independence”, “what are you actually voting on”, it just included on two sides of the pamphlet, adverts from the yes campaign and the no campaign. It didn’t actually give you an answer, but allowed you to make up your own mind.



**Scotland's future in Scotland's hands.**

Follow the Scotland OCE

The referendum on September 18th is a choice of two futures.

A Yes vote means a future where we can take our own decisions and build a more prosperous nation, a Scotland where we can all truly flourish.

As one of the richest nations in the world, Scotland can afford to be a successful independent country. We can make this vision work better for everyone who lives here, from looking after older Scots to making life easier for young families.

A No vote means a future stifled by the repeated failures of Westminster governments, governments we didn't even vote for.

September 18th is a once in a lifetime opportunity to create a thriving new nation.

Let's grasp it with both hands.

**Yes**

[YesScotland.net](http://YesScotland.net)

### The Best of Both Worlds For Scotland

We believe that we can have the best of both worlds in Scotland as part of the UK. We can have a strong Scottish Parliament, with more powers guaranteed, and we can have the strength, security and stability that comes from being part of the bigger UK. We don't need to choose between the two.

Voting for separation would be a huge leap into the unknown. If we leave then we lose the strength of the UK pound. This would mean we would pay more for our mortgages, credit cards and loans. If we leave we are putting our pensions at risk. If we leave we are risking big companies being forced to move south and Scottish jobs being lost.

If we leave the UK there would be no going back. In September we face a choice about our future. Let's say no thanks to all of the risks and uncertainties of independence. Let's say loud and clear that we want the best of both worlds for Scotland.

**NO THANKS**

[www.nothanks2014.net](http://www.nothanks2014.net)

Published and printed by Blair Bell Group on behalf of Better Together Scotland. The Electoral Commission, Glasgow, G2 8DS. Better Together 2014 is a company. No thanks2014 is registered in Scotland. 02-02-02.

Excerpt from Electoral Commission information booklet designed to inform voters “What are the arguments?”



## Indyref 2014: some unresolved questions



- Framework referendum legislation
- The role and regulation of social media
- The role and regulation of traditional media
- Providing impartial information
- Trickier questions of inclusiveness
- Losers' consent vs settling the independence question
- Sanctions for non-compliance with referendum campaign rules
- Sequencing – interlinkages of participatory mechanisms


I'll only focus on a few of the unresolved questions. On the role of social media, during the Scottish referendum campaign in Scotland fair rules from traditional media were transposed to social media. This was before the rise of fake news and disinformation campaigns; all of those questions are still unresolved, and the Brexit process shows us how important it is to address them, not just for referendum campaigns but also for elections. Media impartiality did come up in so far as the BBC was attacked, for not holding to its impartiality duty, and especially how critical it was of the pro-independence stance and seen as not as equally critical of the status quo campaign.

The question of sequencing and interlinkages of participatory mechanisms I think is really interesting. Had 'yes' carried the day, what the Scottish government promised was another participatory and deliberative process, a Constitutional Convention, that would draft the new independent Scottish Constitution, and setting out some things it wanted to see in that Constitution. That didn't happen, but what the Irish example is also bound to provide, are lessons for how you actually move from the micro to the macro deliberative processes of a Constitutional Convention or a Citizen's Assembly, and a referendum. I think there is still a lot of work that scholars and academics need to do on thinking how those work.

## PRESENTATION 1:

### WELSH REFERENDUMS: THE STORY SO FAR

Prof Richard Wyn Jones, Director of Cardiff University's Wales Governance and Dean of Public Affairs




Canolfan  
Llywodraethiant Cymru  
Wales Governance  
Centre

# Welsh referendums: The story so far

Richard Wyn Jones  
Canolfan Llywodraethiant Cymru//Wales Governance Centre  
Prifysgol Caerdydd//Cardiff University

I am a political scientist, interested in why people voted the way they voted as well as the of the particular proposals they were voting on.



## Welsh Referendums

- Some context
- Over-view of the 3 relevant referendums
- A few words on “losers’ consent”

To give some context, I am going to talk you through three devolution referendums, and I towards the end I also want to say something about “losers’ consent”.

I want to start with political culture, which was raised earlier. Wales is a one party dominant political system, with Labour as the dominant party; last December Wales voted again for Labour making it a century of Labour dominance.



## Context (1)

- **The proposals Welsh politics characterised by one-partyism**
  - Key debates within dominant party > constitutional design prioritising bridging party divides rather than coherence. Referendums more about party management than generating legitimacy(?)
  - Other parties accept (at least implicitly) one-party context and arrange themselves around cleavage in the dominant party with securing (or refuting) principle of ‘home rule’ far less significant than ‘the detail’
  - Extremely weak Welsh media means that even if genuine debate or deliberation was on anyone’s agenda (it wasn’t – the opposite is true), would be really difficult to achieve

What it means is that the debates about devolution in Wales have been debates within the dominant party. The particular constitutional proposals we voted on are more about trying to bind the wounds within the dominant party rather than arriving at anything coherent; it’s more about party management than any great principle, as you’ll see. It’s certainly more about party management than securing legitimacy. And one of the interesting things is that the other parties implicitly accept the rules of the game.

Within one-party dominance, what happens is that the key cleavage runs through the dominant party and the other parties arrange themselves around the cleavage in that dominant party. So Plaid Cymru and the Liberal Democrats support the 'nationalist' wing of the Labour Party, whereas the Conservatives try to support the 'unionist' wing of the Labour Party. For everybody concerned, the principle of Home Rule - if I can use that 19th century language – is much more important than the detail of what we are voting on.

The final point about the context is that we have an extremely weak media, so even if anybody did want to have genuine discussion, which nobody does, it would be extremely difficult to do it anyway.



## Context (2)

- **The stakes** Attitudes towards devolution divide on National Identity lines but only 'existential' for one side (and then only for a relatively small minority?) And on that side, nationalist tradition strongly pacifist in orientation. Non-violent direct action is mainstream (NB language movement) but very strong taboo against violence directed against people.

Attitudes to devolution divide on national identity lines, so if you feel strongly Welsh you tend to pro devolution, if you don't feel strongly Welsh you tend to be hostile. We have a large English diaspora in Wales as well; up to a quarter of the Welsh electorate feel English and tend not to be particularly supportive of devolution.

For one side of the devolution divide, the issue is existential, it is survival as the nation. For the other side, it matters less. Welsh nationalism is strongly pacifist; non violent direct action in Wales is a strong tradition in Wales.

## Devolution referendums

- The story so far...

**1979:**  
"No" to  
Welsh  
Assembly

**1997:**  
Narrow "Yes"  
to National  
Assembly

**2011:**  
"Yes" to  
Welsh laws in  
devolved policy areas  
without UK  
Parliament's  
agreement

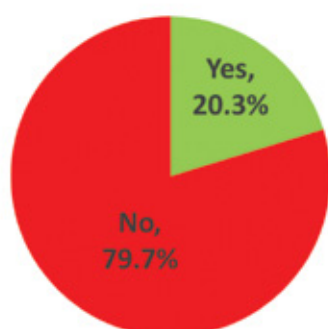


There have been three devolution referendums in Wales.



## 1979 – Comprehensive rejection of devolution for Wales

1979 Referendum:  
Do you want the provisions of the  
Wales Act 1978 to be put into effect?



- 4-to-1 rejection
- Turnout = **59.01%**



## 1979...

- Post-legislative confirmatory referendum after 3 years of parliamentary trench warfare
- Campaign was Labour vs Labour
- Supermajority requirement (40%) NB Scotland
- Total defeat for proposition among all demographics/in all areas
- Result greeted with despair among supporters. Whole genre of Welsh literature focused on defeat, betrayal etc. especially in the context of linguistic decline and demographic shift.
  - Led to *Meibion Glyndwr* arson-campaign
  - UK Government's (belated) decision to deliver 1979 manifesto commitment on Welsh language TV channel – in the face of the threat of a fast until death from Plaid leader – probably staved off something far more serious...

There was losers' consent, in that the supporters of devolution didn't give up, but they accepted that they had been annihilated: when the result is 4 to 1, there's not much room for doubt.



## 1997 – Establishment of National Assembly

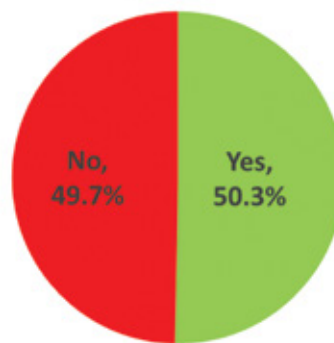
- **Just 6,721 votes in it**
- **Turnout = 50.1%**



just say **no**



1997 Referendum:  
I agree that there should be a Welsh  
Assembly



## 1997...

- Pre-legislative referendum based on vague & aspirational white paper with minimal campaign (interrupted by Diana death) and timed to maximum advantage (week after Scotland).
- Welsh identifiers much more likely to turn out to vote and to vote Yes. Party cues (also related to Nat ID in Wales) also strongly influential.
- Yes campaign much better organised than No campaign (though not clear if it was much better resourced – despite regular claims to the contrary)
- Key regulatory framework was arguably BBC requirement for 'balance'
- Mandate appeared of new institution(s) appeared very fragile (only 1 in 4 supported establishment)

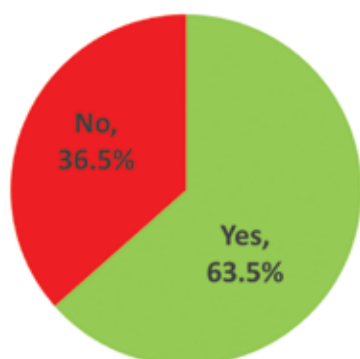
The first thing that the Blair government did in 1997 was legislate for referendums in Scotland and Wales, which took place on the basis of proposal set out in White Papers. In the Welsh case, it was a very thin document; all very vague and aspirational. The actual timing of the referendum was another 'stroke'; the Welsh vote was held a week after the Scottish vote. There was no justification for that; they just knew that the polling showed that the Scots voting yes would bump up the support in Wales a little bit. It was kept out of the election campaign pre-1997, then all the parties had a bit of a break; then they started to campaign after the summer at which point Princess Diana died in an accident, and they stopped the campaign for a while. Through all of this there was very little debate, let alone deliberation of any kind. This was deliberate. The voting split very clearly on national identity lines; Welsh identifiers more likely to vote in the first place and much more likely to vote yes. The yes campaign was much better organised than the no campaign. Note that the regulation in this period was very vague. Conservative Brexiteers have subsequently been very agitated about what they view as differential spending between the yes and the no campaigns in Wales in 1997. But little evidence for this; the no campaign was chaotic. The regulatory framework was basically the BBC requirement for 'balance'; the BBC requirements were more important than anything else. Indeed, you could say the BBC constructed the no campaign by putting people together because they were desperately searching for people to represent that side.

What is interesting about all this in retrospect is that the mandate appears so fragile; only 1 in 4 of the Welsh electorate voted in favour of devolution. Yet by 1999 – even before the Assembly actually met for the first time – support had shot up.

## 2011 - Devolution Matures

### 2011 Referendum:

Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for



- Almost 2-to-1 vote margin in favour of allowing the National Assembly fuller primary law making powers (**Pt 3 > Pt 4**)
- Turnout = **35.2%**



## 2011

- Post-legislative referendum, but 5 years after the fact
- Arguably no central constitutional principle involved (cf. 1979 and 1997)
- Status quo unattractive to all concerned. But also pre-1999 arrangement not a runner so No side ended up arguing for 'better devolution'
- PPIRA regulated but legal and broadcasting regulatory framework struggled with weakness of No side
- Even though NatID still correlated with Yes vote, very substantial 'pro-devolution' swing across all demographics indicating 'settled will'

Here we got a big vote in favour in the referendum but describing what the referendum was about is actually quite difficult! Formally it was about a move from Part 3 of the 2006 Government of Wales Act to Part 4 – with both parts setting out different mechanisms allowing the National Assembly to create primary legislation. It's certainly hard to argue that there was a fundamental constitutional principle at stake that you should be having a referendum on. It's rather better understood as a way of healing the wounds in the Labour Party. The referendum only happened when it happened because Labour went into coalition with Plaid Cymru, and Plaid Cymru insisted on a referendum as the price of a coalition. Turn out was risible. It was a post legislative referendum, but five years after the fact.

For reasons that need not detain us here (about the failings of the Part 3 system) the status quo was unattractive for all concerned. The no side argued instead for 'better devolution' though it wasn't clear what that meant.

PPERA ended up looking like a really problematic piece of legislation because of the way the No side 'gamed' it. They did this by refusing to apply for lead designation status themselves, which had the effect of stopping the Yes side from getting lead designation status. This meant that there were then no mail shots of the kind that went out in Scotland: not even that basic kind of information-sharing could happen. The spending limit on the Yes side – forced to operate as a designated rather than a lead campaign – was only £100,000 in total. Not even enough to fund a mailshots to every house in Wales. So the legislation proved to be really quite problematic. And even if the Electoral Commission were really annoyed when I pointed this out in run up Indyref, the Scottish legislation that governed that vote was at least to avoid a repeat.

While national identity remained important in terms of the vote itself, there was a substantial pro devolution shift amongst all key demographics and across all of Wales, making it look like the 'settled will' in the way that it clearly wasn't before that.



## Losers' consent

By 1999 (i.e. even before NAW began meeting), support for devolution had grown considerably and has continued to grow – this despite the obvious failure of constitutional design that have characterised devolution. Indeed, each time more powers have been transferred surveys have shown plurality support for yet more. Losers' consent was generated in Wales (in marked contrast to the UK post 2016)

**Why?** Multiple factors, no doubt but NB

- Deliberate attempt to include opponents and doubters in process of post-referendum design. Inclusivity became a mantra and had at least some substance. Has continued – e.g. Welsh all-party commission process central in all post 1999 constitutional change.
- Cannot discount the ways in which the new institutions (esp. semi-proportional voting system) offered a lifeline for Conservative opponents of devolution (assisting buy-in?)

Losers' consent was generated both in the sense people accepted the legitimacy of what went on and also people ended up pretty supportive of what had happened. Why? Part of the story is the pro-devolution side viewed themselves as nation builders, and they needed to bring people on board. They deliberately reached out in the design of the Standing Orders of the Assembly which determined what the Assembly would look like; also in terms of the amendments they accepted to the legislation which then followed from the referendum and which ended up establishing the Assembly.

Every time we've had a discussion since about more devolution there's been tended to be establish some kind of an all-party Commission, reflecting a very conscious sense that this could all go badly wrong and of the need to bring people along. Of course, there are limits to what you can achieve in this way; but that said, you can achieve quite a lot in terms of undergirding wider legitimacy if you make the effort.

What really helped was that Conservatives had nowhere else to go in the first years of devolution, when they lost every seat in Wales in the 1997 General Election and didn't win a single seat in Wales in the subsequent one either.

But setting aside such instrumental consideration, the key point is that supporters of devolution made a very self-conscious attempt to bring people along; they were always aware that 50.3% of the vote isn't really enough in itself.

## QUESTIONS AND ANSWERS

**Question 1.** For Sylvia, your reference to more intricate questions of inclusiveness – can you say a little more about that?

**Sylvia:** We should think of inclusiveness as both of the franchise itself and public debate more broadly. So, in Scotland as you all know the choice was to go with a residence-based model, basically to take the local elections register and just go with that. Was it contested? A bit, Scots living in London were not able to vote, whereas new nationals living in Scotland at the time were entitled to vote, but ultimately it was accepted as legitimate.

The opening up of the franchise to younger voters was also an SNP driven point on their agenda; and could be justified in relation to the type of question that was asked: a lot of the arguments were this was a once in a lifetime vote, and that choosing to create a new independent state was a choice that younger voters can make, and should make. There was quite a lot of enthusiasm expanding that and also it was seen as a positive experience for taking that elsewhere, the rest of the UK, other countries etc. Enthusiasm for that seems to have died down.

On the question of how inclusive public debate actually is, there is a danger of thinking that the more spaces of debate that you have, the more inclusive that debate will be, and that is not necessarily the case. Some research that I've done looking at Iceland but also some of the Irish citizen's assembly experiences show that, for example presuming a lot of social media attention means that you've opened up access to more potential voters and I think that is not necessarily the case. We know that access to digital platforms by the young and urban, etc., keeping those questions in mind, not funding or prioritising certain spaces over others is important. Depending on the demographics spread over whichever region that had such a vote, you'd have to look at rural voters, more remote voters, older voters and the spaces they can actually eventually engage in the deliberation. Ultimately, they did a good job in Scotland, just because of the salience of the issue and that brought people out. Designing that into the system is important and not expecting it will automatically follow.

**Richard:** In Wales, the franchise was never an issue because there was this kind of path dependency; I'm almost certain the 1997 referendums in Scotland and Wales were based on the local government franchise. The same was true in 1979 I think, partly because one of the things that the Labour anti-devolution people in particular were pushing, was that if it happens this was local government writ large rather than Westminster writ small, so there was a symbolic politics of, of course it's the local government's franchise because this is a lower status body, but that then fed through into 2014 where there had been a tradition of using this, so there was never a big issue at all in Wales.



**Question 2.** How much forethought was given to the question of nation building, and who was it that was having that discussion of nation building?

**Sylvia:** The Scottish government took the lead on that when they published the White Paper Scotland's Future, trying to go through every aspect of what a future Scottish state would look like in the event of a Yes vote, including the economy, international relations and the constitution making process that would follow. As you might expect, that still left quite a few questions open. Again, you had a paradox. On the one hand, they had to present the case for what would follow, what you're actually voting on and that argument was made in the image of the SNP's priorities. Anecdotally, a lot of people who voted No, did so because they didn't want to vote Yes in favour of the SNP's constitutional future state. There was also an Independence Bill that was published, meaning what legislation would actually be introduced if the outcome were a Yes vote. That is also significant overall for the quality of the process in Scotland, there was still, with all these unknowns, a need for clarity about the outcomes on both sides. Either you're voting in favour of the status quo, or you were voting in favour of a new independent state; still some question marks, but this is the road that we would take in the early months when we set in place another process to try to settle all these issues. Quite a few of those were controversial, the retention of the monarchy for example, the economy, the Bank of England etc. so quite a few of those would have probably needed to be open for debate, but were presented as the State building project that would be embarked on, should Yes carry the day. I want to make one comment on that because it's a thought that was triggered by Richard's argument that precisely because the Welsh project was one of nation building, that's why it carried the day eventually. With regard to devolution I think, again going back to John Dryzek's writing on deliberation and divided societies, he makes it plain that that is exactly when deliberation is less likely. So, when it's devolution in the context of a decision on state building is when you're less likely to get the conditions necessary for deliberation. So, in a way, when sovereignty is on the table, the stakes are higher so it's harder and harder to get people to sit around the table and engage in reasoned debate, as deliberative democrats would have you. I think division and polarisation can complicate matters, and certainly in sovereignty matters more so.

**Richard:** My response goes back to the first point I made about political culture and the centrality of one-partyism to understand anything happening in Welsh politics. In the context of one-party domination, there's no benefit for devolutionists in having big fights within the Labour Party; if they can get anything accepted by the Labour party. The only kind of non-negotiable principle is that the thing is directly elected. The view was always – going back to the late 1960s, here – as long as it is directly elected, and represents the nation, it will gradually accrue legitimacy and power. So, basically if it's primary legislation, secondary legislation, or whatever, let's not sweat the detail. Let's just get a directly elected body.

In the 1990s, having been annihilated in 1979, for the devolutionists it was a case of just trying to catch the tail wind of the Scottish project and the popularity of Blair. But then, once the referendum passed, during the passage of what became the Government of Wales Act 1998, there were pretty fundamental changes to the legislation, and there was a very close collaboration between the devolutionist wing of the Labour party, Plaid Cymru and the Liberal Democrats, and a few friendly Conservatives. Subsequently, partly because all models of devolution have proved to be unstable, they have had to change, and they have adopted this cross-party consensual approach. They have succeeded, to a quite remarkable degree, in moving things forward from where we started in 1999.

**Question 3.** How do you deal with a situation, which didn't happen in the context of Scotland and Wales, where there's an organised boycott, which might be the most likely outcome in Northern Ireland? Is there any experience you're aware of where there's been any attempt to deal with the problems of an organised boycott? What about incentives to vote? compulsory voting?

**Richard:** I wasn't trying to suggest there was a necessary relationship between legitimacy and turnout. What I was saying is that there is a relationship between what's at stake and turnout. What I suspect is that boycotts become less attractive as a tactic if the result is seen to be very close. If I was a strong objector to a United Ireland but feared that for whatever reason, the referendum might result in a narrow win, that the proponents of a unified Ireland were likely to do well, I would be quite worried about a boycott. It depends what the turnout would be, despite the boycott. The political context would matter hugely, in terms of how attractive a boycott would be, or not. Definitely not compulsory voting, that would raise a whole set of issues about legitimacy and would raise so many red herrings that I wouldn't go there, certainly.

**Sylvia:** I think what your question raises for me is what goes on before you even ask the [referendum] question and before you ever start designing a process? Is there an appetite for asking questions that a referendum can be held on, and actually embarking on a deliberative process to begin with? There's only so much a referendum, and a referendum campaign, can do in narrowing the divides, and bringing people together. Once you've decided that there is a decision-making process going on, the stakes are already pretty high, and there's a risk of people entrenching their own views rather than coming together. What goes on before that, whether it's political process of rapprochement or whether it's micro deliberations perhaps across the country to try and shift popular views and get them to see there is actually something worthwhile in having the poll, to begin with, that's where I would put my energy. In terms of compulsory voting, I would say no, but the Australian approach with that might be interesting, where it has been the rule.

**Conor:** Just to add to the point of incentives to make people vote. The GFA has an incentive built in, which is that the British government and the Irish government, both governments have committed to that part of that Agreement, that whatever the outcome, they will implement it.

**Question 4.** Richard, would you talk to us a little more about nation building in the Welsh context?

**Richard:** Very quickly, Wales was annexed and was made indivisible from England administratively. There were no administrative legacies of the pre-annexation period that survived the 'union', as we call it euphemistically. Basically, what you have is a cultural difference centred around language and a religious difference with the rise of non-conformist Protestantism. In the mid 19th century, Wales was fully assimilated except for the language and religious culture.

You then get that classic nation building project you see in central Europe and eastern Europe; this classic attempt to build (in this case) Welsh institutions. That's subsequently been the key focus of Welsh nationalism, which is not confined to Plaid Cymru – it's there in the other parties too. So, building Welsh institutions; having the border of Wales recognised as enclosing an administrative unit: things that would be taken for granted elsewhere. It is very pragmatic in that sense, but it's also hugely idealistic. It's also got a very strong belief that institutions matter.

The very recent growth of an independence movement is very interesting; but with the focus on state building it's also a distinct break from what has happened in the past.

## **PANEL 4:** **NORTHERN IRELAND ROUNDTABLE**



**Eilish Rooney**, Transitional Justice Institute and ASPS, Ulster University

**Prof Colin Harvey**, Professor of Human Rights Law, Queen's University of Belfast

**Dr Fidelma Ashe**, Transitional Justice Institute and ASPS, Ulster University

**Alan Whysall**, University College London

**Prof Cathy Gormley Heenan**, Deputy Vice Chancellor, Ulster University

*Chair:* **Dr Catherine O'Rourke**, School of Law and Transitional Justice Institute,  
Ulster University

## **PRESENTATION 1: REFLECTIONS ON THE 1973 BORDER POLL**

Prof Cathy Gormley Heenan, Deputy Vice Chancellor, Ulster University

Though I am presenting today, it's important to note that this work draws heavily on the joint work that Arthur Aughey, Emeritus Professor at Ulster, and I have been engaged in recently as part of our thinking and contributions to the UCL Working Group on Unification Referendums on the Island of Ireland. So, this is with credit to Arthur Aughey for his extensive contribution here.

For most commentators on the Northern Ireland border poll in 1973, it's just a footnote in history. We haven't really talked about it very much, and it certainly hasn't been part of many of the debates around what we are talking about today. The academic literature has given it a place because it was the first occasion the Westminster parliament actually legislated for a referendum, so it tends to be looked at in that perspective, rather than the lessons that might be learned from it. So, I thought it might be useful in today's workshop to look back in order to help us look forward, to look at the issues that were raised in the 1973 referendum and what that means for any issues that potentially could come up in a future Northern Ireland border poll.

So, the ballot paper asked people to make a very simple binary choice; the question was "do you want Northern Ireland to remain part of the UK"; or, "do you want Northern Ireland to be joined with the Republic of Ireland outside of the UK"? 58% of the eligible electorate registered to vote, and 99 % of those who did vote, voted for Northern Ireland to remain as part of the UK. Just 0.6% voted for Northern Ireland to be joined with the Republic of Ireland.

The unionist parties saw on reflection that they had achieved a really high turnout of their own electorate and that was to achieve their immediate objective. Their main objective was avoiding a result in light of the nationalist boycott that was below 50%. So, the unionist parties were broadly happy with the result. The nationalist parties were also broadly happy because they achieved an almost maximum boycott within their own constituency and succeeding in their aim at the time which was to undermine the political value of the result. So, often in a zero-sum game, in a lose-lose society, we had a win-win in some respects for both sides of the political divide in 1973.





And it raised the big question as to why boycott? The nationalist objection to the border poll was that, if the intention of the border poll was to take a united Ireland completely off the table, then it would fail to address the real source of the problem. The nationalist view was that the border poll was an attempt to take a united Ireland off the table. So, nationalists justified their boycott by trying to argue that the illegitimate majoritarianism that existed on the basis of Northern Ireland's creation guaranteed that unionist hegemony effectively, and that meant the border poll result always going to be pre-ordained, that it was never going to be anything other than that. So, their view was that it was illegitimate in conception, but it was also irrelevant in practice because the poll itself was not addressing the ethno-national divisions that existed in Northern Ireland, and that confirming a majority on that basis would be tantamount to confirming the very problem that the poll purported to address; so the ethno-national question was not picked up in any way in it.

### **What relevance is there from the 1973 poll for any future referendum?**

There are three relevant points:

**1.** The nationalist view that it was pre-ordained or predetermined and the wording of the 1998 Act makes it clear that a referendum should only be called when the Secretary of State considers that the outcome is preordained or predetermined, and it says that “by order, the Secretary of State may by order direct the holding of a poll for the purposed of Section 1 on the date specified”. The most important part is this: “if it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the UK, and form part of a united Ireland”, and there is an element of predetermination even in the way that is worded. So, if the first border poll was about taking Irish unity off the table, a future border poll as envisaged in the Act is about taking the Union off the table and making Irish unity the foundation of any settlement. And so, the intention of a border poll is sort of the same as 1973, except in reverse, to ratify an outcome already pre-judged, confirming that which is already known. The question that follows there then is how meaningful would any referendum be in such circumstances, if you were making the same arguments that had been made in 1973?





**2.** It's not just the pre-determination of the majority, there's also the legitimacy question that informed the nationalist boycott in 1973. Could that same question of legitimacy justify a unionist boycott in any future poll? So, unionists could boycott a future poll for other reasons, but it would be difficult for them I suppose to cite 1973 nationalist reasons, that Seamus Mallon would have articulated in his book. The traditional unionist defence of their rights involves a claim that there exists a people of Northern Ireland with a right to self-determination, and therefore any change to the status of Northern Ireland requires the consent of the majority or the greater number, and we all know that, but is it a majority of the people of Northern Ireland, or the greater number of them, that are expressing a wish to see Northern Ireland to cease to be part of the UK? It brings up a big question about what constitutes a legitimate majority, and that's the debatable part here. So, if 57% of the eligible electorate, which was almost entirely the unionist population at the time, was insufficient to address the real problems in 1973, then would a 50+1%, probably entirely Catholic/nationalist be adequate in any future poll? If it was a majority alone that the outcome was delivered upon, what does that say about the legitimacy? And if the purpose of any border poll is to establish the fact that a majority of those voting in favour of Irish unity, the sovereignty question, why should that majority of 50+1% be denied? It goes back to that previous question about not dealing with the underlying issue. The 50+1% is the sovereign measure, the vote that counts, even if you have a two-referendum strategy, the first one on principle, the second on details. If the first were to deliver a vote on Irish unity, even in principle, of 50+1%, it's difficult to imagine how any legitimacy of that initial vote could be undermined in any subsequent vote.

**3.** The objection by nationalists in 1973 was that the purpose of the referendum was not democratically deliberative in its approach, that the sovereign choice was problematic when it was disconnected from the options that concerned the detail of the constitutional arrangements: Vernon Bogdanor calls it 'the satisfactory relationship' that could accommodate the needs of both Catholic and Protestant communities, and we hear about that in the context of the border poll now. What can people do to persuade unionism of the merits of both a poll and potentially, a united Ireland?

To conclude, what I would say is that the future border poll should probably be the end of a process in which the institutional, the cultural, the financial, the legitimacy questions, have been agreed by all parties and by the sovereign governments, and that would imply a very long drawn out process; and that is even if everybody was in agreement. How can that be done especially if there is widespread unionist boycott, a protest about what they might see, as similar to nationalism in 1973, as a pre-ordained outcome. And that's why looking at the maths really helps us, with looking at the present and at the future; it's an ironic inversion of sentiment effectively that we're facing now.

## **PRESENTATION 2: PLANNING AND PREPARING FOR 'CONCURRENT REFERENDUMS'**

Prof Colin Harvey, Professor of Human Rights Law, Queen's University Belfast

I am going to make three points:

**1.** There is a lot of talk about the Good Friday Agreement, and what the Agreement was for and about. One thing to underline is the idea behind the entire peace process was not to marginalise or exile these questions to the periphery, but to bring them into the mainstream of constitutional politics. We cannot stress that enough. These questions must not be marginalised, exiled or written off as dangerous, corrosive or divisive. Academic events like this, the research that is going on around these islands at the moment, the various forms of engagement, are all part of this process of making this as boring and tedious as humanly possible; of attempting, as difficult as it may be, to normalise and de-escalate aspects of this conversation. Why? Because there is a desperate need to bring it into the mainstream.

Connected to that point, and I do not need to tell anybody who lives here, people have a right to hold a view on the constitutional future of this region. There are various protections around that, and it is vital that this is recognised. So, what we are having today is a legitimate conversation that has been endorsed in referendums on the island of Ireland (22 May 1998), is a normal part of the constitutional legal orders of both states, and is underpinned by international law. Nothing that is being discussed here is stepping outside the constitutional or legal mainstream.

**2.** It is particularly important at this time that people pay attention to what is being said and what is not being said in the civic, political, and other discussions that are happening on the island. We are all human and can easily caricature other people's positions, but it seems to me that in the face of Brexit, in the face of the coercive and forced removal of this region from the European Union that what is remarkable is that the conversation is couched in the dignified language of planning and preparing for these referendums.

There is a tendency to caricature that position as a call for a 'border poll next Wednesday'. I cannot hear anybody calling for a 'border poll next Wednesday'. What I can hear is people making the case for adequate planning and preparation in advance of the votes. Even the term 'border poll' is a rather unhelpful way of describing it. It suggests, for example, that there will only be one vote; it suggests that the only conversation we are having is about the border; and both those things are plainly not true.

‘Concurrent referendums’ may well just be boring enough a term for the boring conversation I want to encourage, but we need to think about the language that we use. The discussion at the moment really is about a civic and political narrative and conversation aimed at planning for the future and preparing for referendums. What is striking is that in the face of unsettling events, proposals and suggestions to mitigate, deal with or address what is happening to this place have emerged. That needs to be underlined again. In other words, people are putting forward constructive proposals for how conversations might be taken forward. Very few people I hear in the narrative on this island are standing up and calling for referendums and sitting down. What I hear, for example, in organisations like Ireland’s Future, and others, are calls for an all island Citizens’ Assembly, proposals for having a Minister in the Irish Government charged with responsibility for taking this work forward, proposals around an Oireachtas joint committee to examine the details of all this, and a variety of civic and other initiatives to work out what this means. All done in order to encourage the debate, in the face of the mounting evidence that, over the course of the next decade, it is reasonably likely that the union with Britain may be coming to an end. In that context, there is a constitutional responsibility on all of us to engage universities and others in prudential planning.

**3.** Do not leave it to the Secretary of State. This simply must not be left to a British Secretary of State to take forward. I am aware of the content of the Northern Ireland Act, and I know the provisions of the Good Friday Agreement, and the law in relation to all that. But we are talking about a constitutional question of such magnitude, it cannot be left to the Secretary of State alone. There has already been a case on the legal provisions; many of us know what that has to say, including on the flexibility the Secretary of State has. There may be further litigation here, and also further litigation in the south of Ireland, around the constitutional provisions there. There needs to be proper civic and bilateral management of this process. In addition to the civic initiatives, there must be robust Irish-British intergovernmental management of where this is going next. It needs to be on the agenda of the British-Irish Intergovernmental Conference, and it also must be on the agenda of EU and UK discussions in terms of the future relationship. A framework and a time frame are needed and that has to be set out at the intergovernmental level. The process may look like the one that took us from the Downing Street Declaration to the Good Friday Agreement in 1998; a Joint Declaration from both governments, a framework document in a British-Irish context, as much clarity and certainty front loaded, framed in the way the Good Friday Agreement envisaged in terms of relationships around these islands. Even then we must acknowledge that there is a risk of a boycott. One way to try to mitigate that risk is to make sure the debate is framed in a more inclusive way, involving both governments and political parties, but also including the European Union, because the European Union will be impacted, as will its member states.

If the outcome is reunification, it will be a managed and agreed transition that will take place over time, agreed by both governments, with input from the European Union and other international actors; it will be framed by the Agreement, and the protections that carry forward, relevant international standards, and existing guarantees.

Just to finish where I started, it is reasonably likely - based on existing evidence - that the Union with Britain may be coming to an end over the next decade. This initiative, and others, are part of a process of sensible and prudential management, within which human rights have to be at the centre.

For the Irish Government, this island and these islands, it is time that we all started to get reunification ready.

## **PRESENTATION 3:**

### **THE ROUTE FROM A BORDER POLL TO A UNITED IRELAND**

Alan Whysall, University College London

My career background was 35 years in the Northern Ireland office, off and on. In particular, I was involved with the preparation of the Good Friday Agreement, including the constitutional parts. And always very struck by how little discussion there was on constitutional issues in those negotiations.

So, though the Agreement lays down the beginnings of a framework, I was always conscious how much it left undecided about the route to a United Ireland, or what it looks like.

And yet, people have been more and more talking about a border poll and a United Ireland. Some of them English instant experts on Ireland in the May cabinet who started implicitly threatening border polls, which struck me as playing with fire. But there were also some people – Enda Kenny among them – who suggested the Agreement offered a route to a United Ireland. Which it doesn't, it offers only a principle and a trigger.

That led me to discussions in the Constitution Unit and the production of the paper last year about a border poll. It was fairly unexplored territory – though Colin and Mark Bassett beat me by a couple of weeks with their paper.

And since then we have put together the Working Group composed largely of academics from this university, including Cathy, QUB, and two in Dublin, as well as UCL. Like the paper, we have no position on whether there should be a border poll or not, or whether there should be a United Ireland, only a concern that there is sensible process mapped out to cover the eventualities.

Nevertheless, I'm speaking in a personal capacity, and what I say is not necessarily what the working group will conclude.

#### **In summary**

People need to adapt to the new reality where a border poll is perfectly possible, if probably not imminent, and we have to be prepared.

But also to recognise the route to United Ireland thereafter will be a very long and complicated one, full of really difficult decisions and risks of things going wrong. We need to plan for it carefully.

And an electorate, North and South, may ultimately not be up for risky strategies, particularly ones that put at risk their own well-being.

Questions round a border poll do need to be addressed. It is the process we have in the Agreement, is arguably the cornerstone of it, without which the Agreement is liable to collapse, and it is not impossible we shall find ourselves in a position where under the Agreement a poll has to be called, before long. This morning's survey suggests not, others suggest otherwise, and we are still at the mercy of seismic developments on Scottish independence and perhaps Brexit.

It hasn't at any time been properly been thought through. Tracing the history back, the idea of a border poll does not seem to have arisen out of any developed thought about how it might work, if ever implemented, and provide a smooth route to Irish unity.

It was an expedient to try to resolve political and violent conflict. And it eventually played its part in doing so. But there wasn't much thought about how it might actually work.

So in the early 1970s the British government hoped to take the border out of politics by holding a poll. The poll happened. It did nothing at that stage perceptibly to diminish the conflict, but holding further polls was provided for in the new constitution of Northern Ireland in 1973. They were set out in a purely negative form: Northern Ireland would not cease to be part of the UK without approval in a border poll. But there was an understanding that if such a poll showed a majority for Irish unity, the situation would radically change. Not that anyone thought it would.

Constitutional status was I believe discussed in the 1991-2 talks, and certainly in various dialogues, including those between John Hume and Gerry Adams, that underlay the Downing Street Declaration of 1993. The Declaration made clear that a decision whether or not to have Irish unity was a matter for people in the island, voting in the North and in the south, and no one else.

Constitutional status wasn't discussed at all in the negotiations that led to the Good Friday Agreement. The 1993 principles were simply adopted, and people argued about much more immediate differences.

And to the principle of the 1993 Declaration, was added the trigger: the Secretary of State must call a poll if he thinks a majority voting in it would favour a United Ireland (though the law permits him to call one at any time).

As set out in the agreement it is a binary choice. There had been discussion, for example in the New Ireland Forum, about halfway houses, like joint sovereignty. There is none of that, apparently, here.



This is what we have, it is the cornerstone of the Agreement, we have to work with it. But it poses a particular challenge because it is in marked contrast with much else in the Agreement, which puts the emphasis on consensus.

The Agreement itself was approved by consensus: a majority of unionists and the majority of nationalists. And that is how key decisions in the power-sharing institutions have to be reached.

(The exact formulation is possibly now growing outmoded, in the light of voting patterns which suggest the growth of a centre ground, and surveys that suggest a majority no longer identifying one of those two camps. But the principle retains all its validity).

Because it has been the received wisdom since the 1970s that government in Northern Ireland will not work except on the basis of substantial acceptance in all the main parts of the community.

And so, the questions raised by Seamus Mallon about whether 50% +1 will yield a functioning and harmonious new Ireland need to be addressed.

It would of course be hard to take on the binary formulation directly, so as to change the Agreement: so much history and politics underlie it, and trying to get consensus to change it seems fanciful. The Agreement can however develop, as it has already.

The conclusion I come to looking at the prospects for unity is that if we get into a border poll, we need a very careful, and inevitably lengthy, process and an atmosphere of constructive politics, including a good relationship between the British and Irish governments if we want the island, following a border poll, to be harmonious and ultimately successful.

And the cause of harmony, and perhaps indeed the cause of Irish unity, might actually be furthered by looking at halfway houses, rather than confining ourselves to the binary choice of constitutional status.

As I said, very little is laid down in the Agreement about either the route to a United Ireland, or what it looks like: beyond the principle, the trigger of the border poll, and slightly vague provision for “concurrent” consent in the South, after which the two Governments would bring forward proposals for unity. We should regard that as statutory shorthand: nobody imagines that the two governments can get into a room and draw up a plan together without talking to other people.

But there is no guidance for example on how the Secretary of State should go about exercising his powers. There is a discretion to call a northern poll at any time, but he has to do so if it is likely that a majority would vote for unity. How does he decide that? If there were a majority in the Assembly that voted in favour of a poll, it would be hard for him to resist. If there is a succession of reliable opinion polls that showed a majority, if slender – 52 to 48 is a mandate for anything, after all – then he might at least need good countervailing evidence to resist. Opinion polling hardly offers consistent guidance at present.

But there is wide agreement that we have to go in to a poll with propositions on the table. As Gerry Adams said last year, perhaps impertinently commenting on experience in the adjacent island, it is stupid to have a referendum without a plan. It would seem sensible for there to be a period of years for plans to develop, if they had not been developed. Plans for unity; one would assume there would be an alternative offer on the part of unionism, which might or might not include the British government, for a Northern Ireland in which people of nationalist outlook might feel more comfortable.

But the difficult question is how do you get unionism into the shaping of a United Ireland. We run up here against one of the really serious practical difficulties. There is talk of involving unionism in discussions before a border poll. It seems to me fanciful to imagine you can get political unionism to participate in drawing up such plans before a United Ireland is absolutely inevitable. They will not divide their time between campaigning forcefully against a United Ireland, and specifying what it ought to look like.

I don't see how you get round this with Citizens' Assemblies or other such consultation techniques.

If there is to be a negotiation with unionism, and it is hard to see a peaceful and harmonious state emerging without it, it has to take place after the decision in principle. Perhaps with a formal consensus threshold built in to the design, as in the 1996 to 1998 Agreement talks.

But that creates the conundrum of permitting a further Unionist veto. It is the best we can come up with, therefore, that failing agreement a set of default provisions for basic unity come into play?

Such a negotiation, of course, and the associated preparations for a United Ireland, potentially needs to last for a period of some years. The questions to be dealt with – institutional, financial, and so on – are enormous.

Associated with this is the further question of how many referendums are to be held. If there is to be post agreement negotiation, I find it hard to see how potentially very substantial amendments to the Irish Constitution – the current Taoiseach spoke last year of the need for a whole new Constitution – can realistically be legislated for in advance – and therefore there may well be two Dublin referendums. In which case, especially if you are adopting a new constitution for the whole of Ireland, it is hard to see how a second referendum in Northern Ireland can be avoided.

We are still discussing this issue in the Working Group, and it is not my home territory, so I speak with diffidence. But if the Constitution is to be amended, a referendum is needed for that. And if it is to take place in the South, it is hard to see that a referendum in the North, shortly to become part of the state government under the Constitution, can be avoided either.

All this is potentially a process lasting over a period of years. And one of enormous delicacy, which could easily collapse into chaos, which inevitably in the context is going to lead to threats by some of violence, which may have a measure of support.

To reduce the risks of this, we need at all stages to maintain a spirit of constructive politics. And a good relationship between the two governments.

We have not had those for most of the last three years. The position improved a great deal on 13 January, which owed a lot to the working relationship between Julian Smith and the Irish Foreign Minister. But one is gone and the other will be going, and how much concern there is at the centre of the British government for maintaining both is not readily apparent.

What concretely should we do now? I do come back to the need for these issues, the process and the destination, to be discussed.

There are some in unionism who are still maintaining that it is destabilising even to talk about border polls. I can't see how that is the case: people are talking about them, and unionism would logically be focusing on the strategic imperative of persuading people it had a better alternative to a United Ireland.

And for those who favour a United Ireland, it is worth looking at the strategy. A big bang may not be the best plan.

And in the south, though it appears at present a majority of the electorate would welcome an early border poll, the appetite for importing conflict, and drawing attention away from housing and health and other such day-to-day issues, may ultimately be limited.

Given the risks of the process, my take is that someone seriously looking for a United Ireland might reflect on moving in smaller steps and more consensually, overcoming the divisions imposed by Brexit, East West as well as north-south, looking to do worthwhile things together rather than apart, working the existing north-south and east-west machinery to their full potential.

But we may well come to the crunch, and the poll: and we need to be prepared for that as well.

## **PRESENTATION 4:**

### **THE LOCATION OF WOMEN IN REFERENDUM DEBATES**

Dr Fidelma Ashe, Transitional Justice Institute and ASPS, Ulster University

I am working with Eilish at the moment, so I'll give an introduction to some of the issues, and then Eilish will talk you through some of our concrete plans in relation to those issues.

Loyalist community activist Jamie Bryson recently used the term 'the persuaders' to describe those commentators and scholars who make an argument for unification or envisage it. He understood that process of persuasion in the fashion of the laws of attraction; you think it, you say it, you believe it and it manifests itself. Now, those who oppose unification, of course, could also be called 'persuaders', persuading us that the constitutional status quo is better than any transition. Regardless, we know, as Colin set out for us, debates are emerging, narratives are coming and if things move in the way we think they will, we are going to have different kinds of debates; some will have evidence, some will be divisive, some will be nasty, some will hark back to the past, some will rehash the past. But we do know we will have a public sphere where these debates are happening.

What Eilish and I are interested in is where are women going to be located within this public sphere of debate. We know from our combined historical analysis as feminists, that during constitutional change, women tend to be marginalised. That is our history. No-one in this room would say it, but someone might say those are the old days, you're talking about an old form of nationalism. Nationalism has reinvented itself, all those others, women, LGBT, all those excluded others that the nation's values were harnessed around. All of that has changed. Those identities now represent progress. Now they seem to reflect the normative aspirations and principles of the nation. Things have changed, and we don't have to worry about these exclusions anymore.

Also, women were not at the forefront of politics the way they are now. Women are not following politics anymore, they are leaders. They have power, they have influence within the political parties. So surely now, women's interests are going to be represented in new ways, in modern ways, we can forget about the past. Unfortunately, we don't unhinge ourselves from our gendered past so easily.



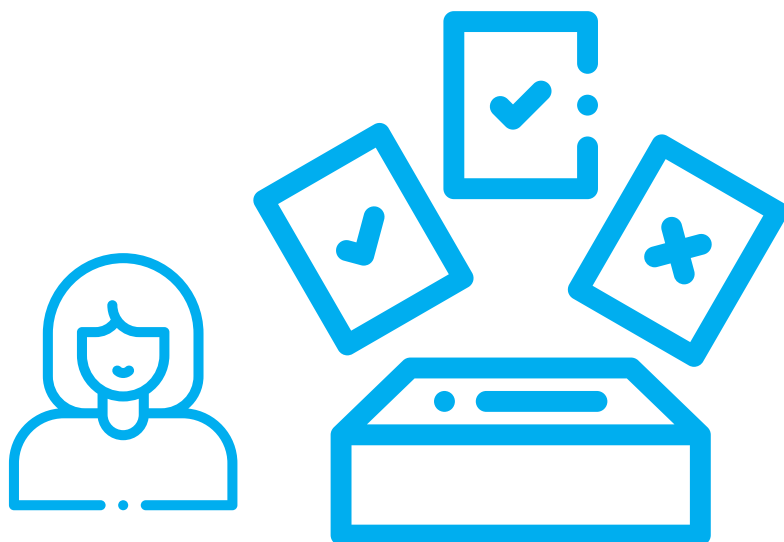
I want to try to explain this, with reference to an article by Elena Bergia. She engaged in a recent study with politically motivated ex-prisoners. What she found was very interesting. She found that, unlike women politically motivated ex-prisoners, these men possess something called seductive capital. So, when the women came out of prison, the women came out of prison. When the men were released from prison, they found they were exceptionally attractive to the opposite sex. As one of Bergia's respondents said, when the men were released from prison, 'the women were mad for them'. This illustrates a really important point, and the point is that seductive capital goes beyond mere affairs of the heart. Journalists, politicians and academics will court the views and opinions of some groups more than others. In other words, whatever we're going into, whatever shape it is, or whatever materialises, we do know one thing; each social group is going into these debates from a completely different historical position.

So, what can we do about it? That's a really big question, but we can ask a few questions. Something else we know from Bergia's study is if you look, there was no great patriarchal plan, there was no headquarters saying let's create this gender difference; and it's the same thing that's going to be involved in this debate. There will be no grand patriarchal plan, there'll be no group of people saying keep the women out. It's not going to work that way. The power relations are much finer than that. But what we'll get is the same patriarchal effects.

So, what might we need to think about when we are thinking about women's participation, inclusion, I haven't even found the right word yet, for what we're hoping to talk about more and explore? I think first of all, if we look back at history, we'll note that women's participation hasn't been a priority; I think that is one thing we have to look at first of all. Where do different groups sit on the hierarchy of priorities? And if they're sitting down here, we know what's going to happen.



Secondly, women can so easily, especially in this culture with all our modernising and progressive change around identity politics, become a signifier for progressive change and an emblem for participatory politics in someone else's argument. What that means is that women yet again have utility for someone else's argument. Women need to be able to inform those narratives. They cannot simply be signifiers between nationalist or other groups. We've a history of women being utilised in ways that benefit other groups but as many of us feminists have noted, that utilisation is rarely accompanied by any redistribution of gender power and influence. We need to ask questions about how can women be invited into debates? And if they are invited in, what are the terms of that invitation, really? Can women create their own spaces? We know, in the Scottish case, that women had multiple entry points into the debates. One of the ways they entered those debates was to create their own autonomous spaces. The other question is, can women push their way in? And if they're going to push their way in, if they're going to have to push their way into debates, what kind of resources do they need, and I'm not just talking about economic resources, I'm talking about resources from scholars, academics and activists. Can we provide any resources? The first thing I suppose, the most important thing for all of us if we're working on this issue is that we ourselves include women, beyond the symbolic, and understand that if we're using terms like human rights, and if we're using terms like autonomy etc., those same terms apply to women. And if the internal dynamics of change don't recognise that, then all of those terms become very partial.



## **PRESENTATION 5:**

### **CONVERSATIONS ABOUT A BORDER POLL: FLASH CARDS**

Eilish Rooney, Transitional Justice Institute and ASPS, Ulster University

How do we have a conversation about a referendum that includes people who live in marginalised and disadvantaged districts across the north? These districts experienced around 80% of the conflict related fatalities and most of the ex-prisoner families live in these areas. References in the media and in academic articles to ‘divided communities’ are frequently a shorthand reference to Belfast’s mainly nationalist and unionist working class districts. At interfaces, such as those in North Belfast, these districts are often divided, literally, by peace walls and gates. However, in common with Northern Ireland’s wider population, people living in these districts have had very different experiences of the UK state, of union within the UK and very different experiences of the conflict. In this workshop my aim is to dispel any assumption that constitutional conversations in grassroots communities will be more contentious than elsewhere. Community organisations in these districts have long experience of managing difficult conversations and damaging disputes.

Constitutional conversations, such as the one we are having today between experts, are vital. They take place formally and informally between economists, lawyers, social policy advocates, educationalists, health professionals, businesses and many others. The question I address today is, how do we have conversations - genuine, well-informed, participatory conversations, about a referendum that will include the views and experiences of people in disadvantaged districts? These people have expertise in their own lives and locations. This is knowledge that should be fed into island wide conversations.



Disadvantaged districts will be areas that are most directly affected by the prospect of a referendum as well as by its outcome. Inclusive, respectful and informed conversations are critical. For that reason, as a member of the Constitutional Conversations Group, and drawing on my past experience of community education, I designed a framework for grassroots conversations as a way to inform and prepare for the referendum whenever it will be held.



In Scotland, the publication of Scotland's Future, was one way that the population was prepared to have genuine, well-informed deliberations ahead of the referendum. However, at a hefty 316 pages, reading the document requires dedication and explanation (the Q&A appendix is an excellent example of a readable and pragmatic approach).

The population in Northern Ireland was prepared for the referendum on the 1998 Agreement by the distribution to every household of a copy of the Agreement. At just 35 pages, with lots of open spaces, the document is accessible and readable. It sets out the structure and substance of future relationships within Northern Ireland; the North - South arrangements, and constitutional affairs across these islands. People participating in the 1998 referendum were well and succinctly informed. The 1998 NI Act that gave effect to the Agreement is a different reading experience altogether but it came later.

Setting aside, for the moment, matters of the full implementation of the 1998 NI Act, it would be a tremendous achievement if at some stage in the future, ahead of an Irish unity - UK union referendum, we could have a roadmap document put to the voters that was as readable and accessible as the Agreement; as ambitious and inclusive, and as concerned with rights and equality; ideally the document would set out timeframes, stages, options and outcomes. This could provide a link to a more detailed, more Scotland's Future type document containing details.

I fully believe we can have inclusive, civic, preparatory conversations ahead of and alongside the work required to produce these documents. One of the things that I have undertaken as a member of the Constitutional Conversations Group is to explore ways to have preparatory conversations. Adaptable, participatory methods have been effectively used in the past to enable structured, informative, inclusive and respectful dialogue (Transitional Justice Grassroots Toolkit, 2016). The methods work best if participants adapt the framework for their own purposes and take ownership of the conversation. Topics can be added to suit the participants' concerns and circumstances. Drawing on Toolkit experience, I designed four flash cards for the purpose of holding grassroots conversations about the referendum. The cards are called, Constitutional Conversation Cards.

The Constitutional Conversation Cards I'm about to show you are the result of some work already carried out with women from a cross-section of loyalist and republican communities. The women tested a set of pilot conversation cards about the referendums (provided for in the 1998 Agreement). The women tested the cards and gave feedback. Their feedback sent me back to the drawing board to redo the cards. I've redesigned them several times since on the basis of feedback from helpful users and colleagues. Fidelma and I plan to use these cards with women from ten community organisations. With a funding grant, we are planning to engage with around 100 women in constitutional conversations in 2021.

I'd be delighted, if you're interested, if you can provide feedback on what I'm about to do; tell me what you think does and doesn't work. An experienced facilitator could do a great job, I believe, using the Constitutional Conversation Cards to discuss practicalities with regard to referendum questions, ages of voters, and much more including the local implications of leaving the European Union.

These are the four cards A - D.

## Four conversation flashcards a framework for democratic deliberation

### **A. Constitutional Conversations – Have Your Say**

Gets the conversation going with some information to encourage everyone to take part.

### **B. What matters most about holding a referendum?**

Considers hopes, fears and concerns and asks what can be done.

### **C. Preparation**

Looks at preparation, at what should happen over time and what participants can do.

### **D. Everyone has a say – sharing the island**

Discussion of practicalities including European Union, referendum questions, age of voters.

Each Flash Card has some conversation topics on the front and information, questions and activity prompts on the back. The cards can be adjusted to suit the interests of different groups:

Card A: gets the conversation going with some information to encourage everyone to take part.

Card B: puts hopes and fears up front and poses pragmatic questions: what matters most? what concerns do you have? what do you need to know?

Card C: considers preparation, timeframes and who should be involved at different stages. Participants are asked to consider what they themselves can do by way of preparation and participation.

Card D: closes the constitutional conversation that lasts around an hour or two.

The cards provide a facilitated structure for an inclusive conversation. The process begins by asserting the importance of everyone having a say, being listened to, using information and exchanging views.

## Constitutional Conversations - Have Your Say

The 1998 Belfast Good Friday Agreement

Constitutional relationships: Ireland & UK

What is the purpose of a referendum?

Have your say

Card A begins with Constitutional Conversations, Have your say. So, imagine us in this workshop using the 'Have Your Say' card together or with a community group or organisation. To begin, we might take a look at the GFA and what it has to say about constitutional relationships within RoI and between RoI and the UK. This first card frames the 'having your say' process by posing the question: what is the purpose of a referendum? The repetition of 'Have your Say', at the bottom of the card, reiterates the theme of the whole conversation.

When this first card was tested in practice, you might be surprised, as I was, by how little people remembered about what was in the Agreement and also how interested the women were in reading and discussing it.

This next slide shows the back of Card A.



**The Agreement** was approved by the Irish and United Kingdom governments, participating political parties and referendums North and South. It is an international treaty deposited with the United Nations.

**It changed** the constitutional relationship between Ireland and the UK - Ireland dropped its territorial claim to NI & the UK provided for a referendum to be called by the Secretary of State for NI. The outcome will be decided by a majority voting at the same time in each jurisdiction.

**A constitution** is more than law or how a state is governed. It sets out hopes for the future.

**A referendum** allows disagreements to surface in valuable ways; it may be divisive and expose complex issues for which there are no ready answers; it reveals how people think about an important matter at a particular time and it decides a course of action that requires preparation.

**The flash cards** encourage everyone to have their say and listen to other views.

**Give your view, discuss, note, call out**

So, as you see, the reverse of Card A has topics of conversation by way of information about the Agreement and how it was reached; that it was deposited with the United Nations; how it changed constitutional relationships between RoI and the UK, in that Ireland dropped its territorial claim to NI, and the Agreement provided for referendums, the outcome of which will be decided by majorities voting, at the same time in each jurisdiction.

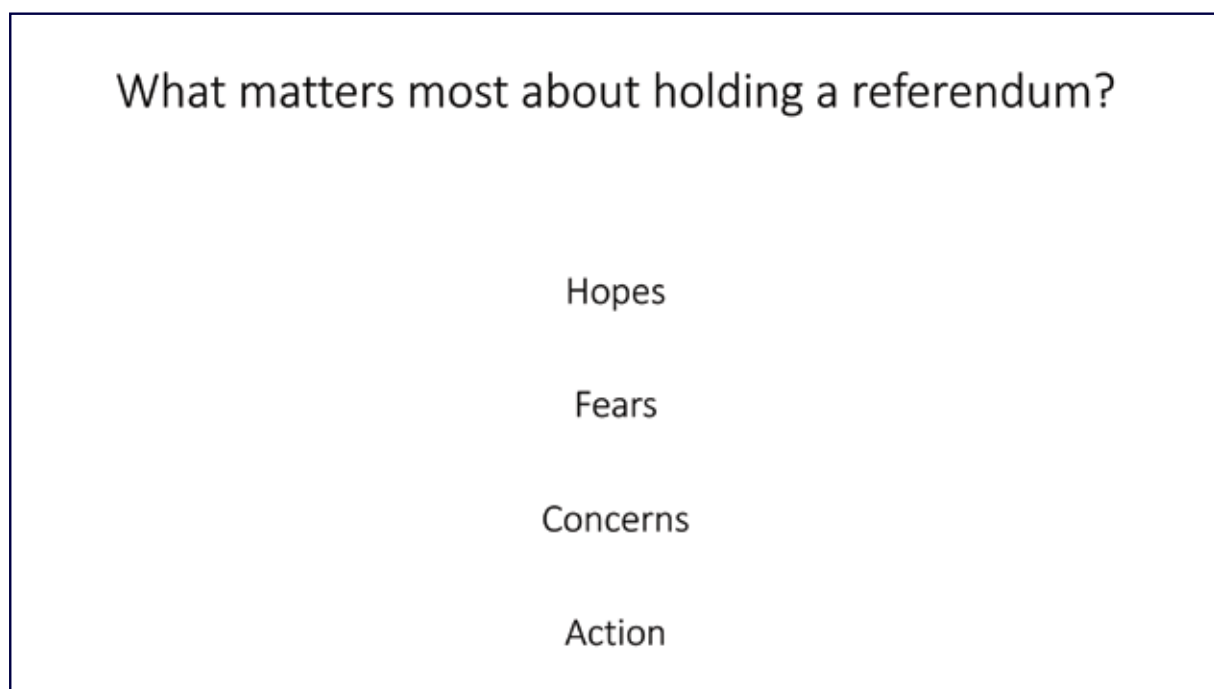
A short definition of a constitution as a legal document that also articulates a people's hopes is a way of acknowledging that hopes belong to everyone whatever their political views. This grassroots conversation doesn't lead to a place where anyone's hopes are ignored and left behind. Although, as has been said earlier, the conversation is wider than any workshop or local conversation and will carry on beyond it. Acknowledging hopes, fears and frustrations is not a way to stop dialogue but a way to secure respect, inclusive participation and recognition of different views and experiences.

This grassroots conversation allows referendum disagreements to surface in valuable ways. Exchanges may be divisive and may expose complex issues for which there are no ready answers. But bringing disagreement, hope and fear to the surface involves people in articulating and thinking through matters that are important to them at a particular time. The referendum will eventually decide a course of action that requires this preparation and clear information about the decision to be taken.

So, while the Flash Cards encourage everyone to have their say, the activity prompts at the bottom of each card suggests a way to do this with a facilitator. In this case, individuals may use post-it notes ahead of having a chat in small groups. Then everyone comes together and the post-its and flip chart call outs are displayed for everyone to see. The objective is to enable everyone to give their view on the substance of Card A and to have their view made visible to others.

The next slide shows Card B What matters most about a referendum? It asks participants to consider hopes, fears and concerns. And also, to think about the action they may take to advance hopes, counter fears and address concerns.

Card B front



Card B: What matters most about a referendum? What are people's hopes and fears, their concerns? And what action is available to them, to counter or address their concerns?

## What matters most?

**Hopes** in the short-term and in the future

**Fears** in the short-term and in the future

**Concerns** might include

health, housing, education, employment, welfare, identity, women's equality, young/older people, treatment of minorities, environment, business, culture, security, sport, head of state, language, flag, marches, location of government, other?

**Action**

What can be done to deal with any of these issues?

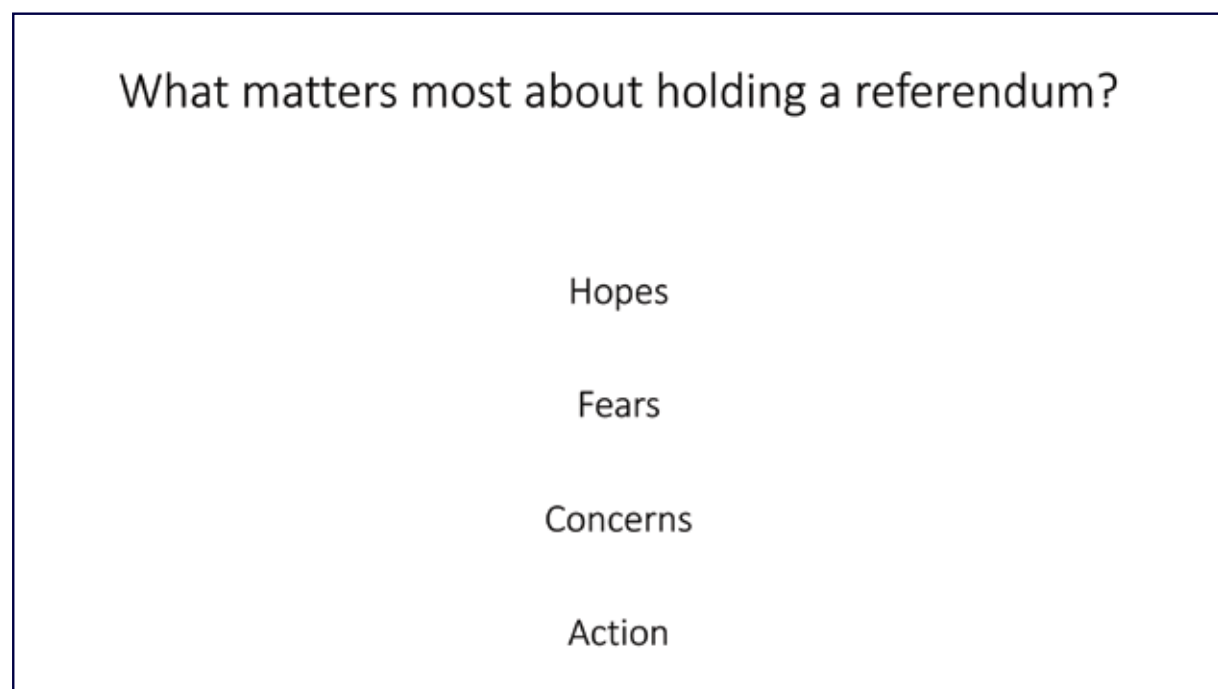
**Give your view, discuss, note, call out**

The back of Card B asks participants to consider hopes and fears within a short-term and future timeframe. The list of concerns comprises some topics that may evoke both hopes and concerns shared by participants. The list can be added to. Some people may name personal, community and societal issues that are not listed. The point is to enable participants to feel free to talk about a future that we face together and maybe to think about the prospect in different ways. The agency or action prompt is for participants to record what they can do and what they want to see done. Post-its and call out charts are again visible for reflection.

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**Action**

What can be done to deal with any of these issues?

**Give your view, discuss, note, call out**

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Card C front

<p>Preparation</p> <p>What should happen?</p> <p>Who should be involved?</p> <p>When?</p> <p>What can you do?</p>
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Card C back

<p>Ahead of a referendum</p> <p><b>What</b> should happen ahead of a referendum?</p> <p><b>Which</b> people and organisations should be involved in what roles?</p> <p><b>When?</b> Give a time frame for what should happen.</p> <p><b>What</b> can you do?</p> <p>Give your view, discuss, note, call out</p>
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The theme of Card C is preparation. On the reverse of the Card, questions are asked about what should happen when. Once again, notes on deliberations are posted for all to see.

The last card, Card D closes with referendum practicalities including options as to the form of question to be asked, the age of voters and the timing. Once again, this card closes with posting views for all to see.

Card D front

Everyone has a say – sharing the island

Referendum questions

Options

Other issues

Card D back

## Having a say ...

### Referendum sample questions

- a. Should Northern Ireland leave the United Kingdom and form part of a United Ireland? Yes/No
- b. Should Northern Ireland remain part of the United Kingdom? Yes/No

### Options

- c. Should Northern Ireland leave the United Kingdom and form part of a federal Ireland? Yes/No

[federal = power divided between regional assemblies and a central government]

### Other issues

European Union; age of voters; timing of the referendum (minimum period between polls is seven years)

**Give your view, discuss, note, call out**

A facilitated Constitutional Card Conversation workshop closes with everyone reviewing the notes posted during the session and perhaps with some call outs on expectations, what happened that was unexpected, and what was learned as well as decided by participants.

In conclusion, I return to the question that I started with: why shouldn't people in North Belfast's Duncairn, Mount Vernon and Tiger's Bay districts benefit from participation in constitutional conversations? They have as much right as the rest of us to be involved in these deliberations. The views of people living in urban marginalised districts of Belfast and elsewhere, will be decisive to the referendum outcome. Preparation and information, such as we are gathering at this workshop today, will be crucial to the whole process.

## QUESTIONS AND ANSWERS

**Question 1.** How do you resolve the difficulty of addressing risk factors that go with two sets of referendums, if for example the first part is agreed, but not the second, and does this lead to being trapped in a loop?

**Alan:** it needs to be thought through, in the light of political realities.

One proposal I put forward in the original paper that you would go into the first referendum, and if it was agreed in both parts of Ireland, there would be a set of default positions for a united Ireland which might be a mirror image but giving both sides something to do better on in negotiation. This whole process is full of conundrums.

**Question 2.** A conundrum and risks – do you want to construct conditions for discussion of a referendum to be in place beforehand, or do you envisage the referendum process one where those conditions will be produced?

**Fidelma:** I think there's no clean-cut process, or utopian model. The most important aspect of this is whether we start to move in the direction of trying to articulate perspectives; what is important to me, is whichever process takes place, women must be allowed to participate in those conversations. But I can't predict what might be the best transitional process.

**Colin:** I think the process needs to be front loaded, because planning and preparation means teasing out the problems and questions in advance. There is a possibility of either unionism or nationalism opting out of or boycotting this border poll; either side can boycott because of, for example, unhappiness with the question or general mistrust of the British government.

If we respect the rights in the Agreement, of each side holding their constitutional positions robustly, you cannot expect Unionism and loyalism to help design a united Ireland. But what we can expect is for Unionism and loyalism to prepare a proposition around why remaining in the United Kingdom is the preferable option.

Preparation is needed around the various options. What is the argument to people in this region in terms of a reunified Ireland? Is that tweaking the current constitution to accommodate the Agreement, or is it a new constitution? This all needs to be thought through before the referendums happen. These propositions need to be based in human rights, and be as generous as possible, in order to avoid repeating some of the mistakes of the past. This is a contested society; this process will include debate, and democracy is about robust dialogue and engagement. The threat of force that sometimes arises in this argument needs to be challenged and managed; this will be highly contested and, of course, we do not want anyone to die in the process. But it is a debate that we really need to have and prepare for.

People need to come to the table with clear propositions; that is why preparation and planning are essential. It needs to be a civic conversation, an uncomfortable conversation in different communities, but it also must be a British and Irish intergovernmental conversation about designing the parameters, not leaving the question of ‘who gets to vote’ to the Secretary of State; but for both governments in a calm and measured way, to design a credible process, have a time frame and let people decide. But you cannot rule out people walking away from all that as well.

The outcome can go either way. It is not predetermined, and there is nothing inevitable about the outcome of possible referendums. People have looked at Brexit, they are trying to learn the lessons, to use responsible language in planning for what comes next. In the context of the forced removal of this region from the European Union, which I recently heard a politician describe as ‘constitutional violence’, the language has to be of sensible and prudential management for referendums that will come.

**Alan:** I don’t think calling a referendum is going to galvanise everyone into behaving responsibly, at all. There’s a real possibility of the opposite. But I think there is a responsibility on civic society and persuade people to move in constitutional channels, as it has done in the past with the 1998 referendum.

**Question 3.** UCD has established a group looking at Constitutional Futures. There are triangulated structures, and a need for engagement in each direction, the Union / EU / United Ireland.

**Richard:** the outcomes of Brexit mean that Unionism has no allies in Westminster; there may be an existential dread which makes this conversation even more difficult. This is an incredibly destabilising moment for unionists. Based on the Welsh experience, there needs to be (academic) discussions here on what does Britishness mean? Where is the Union going?

**Jane:** the whole situation is so fluid; for example, in Scotland with a possibility of a second referendum there; that will have a huge impact on the Union. As well, a lot of the ties here are across to Scotland, as opposed to England. There are conversations needed in the south.

[**Colin:** there have been a number of polls in the south, showing a comfortable majority for this happening]

**Eilish:** That call for unionists to have conversations has already gone out. Peter Robinson made a speech (at the 2018 McGill Summer School in Glenties) calling on Unionists to be discussing these issues; and more recently Billy Hutchinson, former combatant and ex-prisoner, called for conversations that unionists should be having. I find that encouraging. I love listening to how conversation levels change; I think grassroots conversations matter and are crucial. They are like mushrooms; there is underground work that happens whenever local conversations occur. It's where these conversations are happening that matters. We're all here today, and there's a lot of interest in having these conversations. Constitutional conversations are an opportunity for union and unity options to be promoted at a Féile event, on reunification, Dawn Purvis said, there's talk of a national health service in Ireland, we've got one, no need. Now that's a really good sell. This isn't just a nationalist conversation.

**Cathy:** unionism have not been comfortable articulating their ideas publicly; and the conversations about what a referendum process would look like are not happening, publicly. My reading of engagement with some senior loyalist politicians is that they're happy to have the conversation privately, but not publicly.

**Fidelma:** I am incredibly sceptical of these binaries; nationalism depends on a sense that there is unity within nationalism, and that unity is maintained; but there is not one homogenous community of nationalists. If you open up the constituencies within these communities in terms of rights, you're going to get a much more complex picture of how people think. The binary view of the two communities is a fiction and depends on excluding certain others.

**Colin:** what is striking, is that this conversation, both here and in Scotland, and to a certain extent in Wales, is about a rejection of narrow nationalism. It is about the loss of being part of a transnational, pluralist European project. From a unionist perspective: What is the Union for? There needs to be a much clearer articulation about what the Union is for, what it is about and there needs to be a greater confidence in articulating that, and it needs to be substantively informed. Unionists need to flesh out the argument for people, who are open to persuasion, to be persuaded. The option of a return to the European Union has dramatically changed the debate here; we will see how the Protocol and the special arrangements work out. But you cannot avoid the reality that Irish reunification now becomes a return option, with the potential to appeal to the 'remain constituency'. Ireland may or may not look like the better bet, in the longer term, for many people here. The field has opened up post-Brexit.

**Alan:** what is the impact on the unionist psyche of the betrayal in the Withdrawal Agreement when they thought they had friends in the Tory back benches, and the increasing signs that England is only interested in England? Generally, within younger generations of unionists, there are profound shifts in outlook.

**Question 4.** What would you see as just, legitimate and inclusive participation would you see in a referendum? And specifically, for a European citizen? Who takes part in the flash card conversations? What did they say? Would you consider doing them in the Republic?

**Eilish:** I am actively looking for invitations to try out the Flash Cards, so would welcome invitations from the south; the work that Fidelma and I are planning is to use these current Flash Cards with around 100 women in different communities. But in the group of loyalist and republican women where I was listening, the women were robust and clear, and spoke about things women share concerns about. That's not to minimise differences because people were very clear about differences and what was best for them. We didn't get into any imaginary detailed futures, but the Constitutional Conversations group plan an International Women's Day event, which will encourage participants to do just that [Note: due to COVID19 this did not happen].

On the question of diverse, just and inclusive participation, that is the great opportunity the cards allow, people say very regular and radical things, and I have no doubt that people would say, why can't a European citizen living here vote. I have mentioned it as a topic in one of the cards; but where we would have to pay attention, is, for example, Travellers are not mentioned in this.

**Fidelma:** we want everybody to participate and want unionists to engage; some senior unionists don't want to have it discussed, so how easy has that been? **Eilish:** it is very interesting to be a woman, because women's views don't usually count, so women's groups get away with doing things, which male groups, ex-prisoner groups for example, might not. The discipline imposed on people around what they can and can't do, hasn't happened yet.

**Fidelma:** I want to go back to this issue of difference. Once you recognise women are an excluded group, it's like an onion. Once you peel the onion, there are all those layers of identity; so that brings in all those other groups of women with all their diverse cross cutting identities. You're going to be pushed, because you'll always be excluding someone; so, you can never say this is women's perspective, until you encompass different groups of women. But if no one is going to listen to you then that's the biggest concern.



**Final questions.** What's the tipping point? How are we addressing fragile masculinities – where is the space for looking at the role of masculinity in this? A prospectus, what should that look like? Who should/would prepare it?

**Fidelma:** On the masculinity question (addressed in Fidelma's book *The New Politics of Masculinity*) and threat of future violence, often the only people who care about the young men who might engage in violence, are the mothers.

**Alan:** I don't think the governments should be engaged in the preparation of a Prospectus; we should be developing civic leadership potential.

**Cathy:** Two prospectus, the proposition for this, and one for that? Perhaps an appointed group of interlocutors? A Commission?

**Eilish:** the back of the Scottish document, there's a set of FAQs, which is a good approach; a document that manages to convey the complexity but in an accessible way.

## PARTICIPANTS

### **Dr Fidelma Ashe, Transitional Justice Institute and ASPS, Ulster University**

Fidelma Ashe is a Reader in politics and a member of the Transitional Justice Institute. She was an undergraduate at Queens University and was awarded a PhD in Political theory by Queens in 2000. She joined Ulster University in 2003 specialising in Critical Gender Studies and New Social Movement theory. She is author of *The New Politics of Masculinity: Men, Power and Resistance* (2007), published by Routledge, co-author of *Contemporary Social and Political Theory: An Introduction* (1999), published by Open University Press, and her forthcoming book *Gender and Conflict Transformation in Northern Ireland: New Themes and Old Problems* will be published by Routledge. She has written widely in the area of gender, ethno-nationalist conflict and conflict transformation. She was invited to become a member of an international feminist research team conducting research on the theme of 'Women and Post-Conflict Transformation: Lessons of the Past, Implications for the Future' which received United States Institute of Peace funding in 2013. She is currently Primary Investigator on the project *LGBTQ Visions of Peace in a Society Emerging from Conflict* which received funding from the AHRC in 2015.

### **Prof Brice Dickson, School of Law, Queen's University of Belfast**

Although he retired from full-time employment in the School of Law at Queen's University in 2017, Emeritus Professor Brice Dickson still engages in legal research and commentary. In 2018 the third edition of his textbook *Law in Northern Ireland* was published by Hart Publishing. In 2019 his monograph entitled *The Irish Supreme Court: Historical and Comparative Perspectives* was published by Oxford University Press and his *Writing the UK Constitution* was published by Manchester University Press (and nominated for a Parliamentary Book Award).

2018-19 also saw the publication of two book chapters. One, 'The Constitutional Governance of Counter-Terrorism' was published as Chapter 2 of *Counter-terrorism, Constitutionalism and Miscarriages of Justice: A Festschrift for Professor Clive Walker* (Hart Publishing), co-edited by Genevieve Lennon, Colin King and Carole McCartney. The other, 'Apex Courts and the Development of the Common Law' was published as Chapter 2 of *Apex Courts and the Common Law* (University of Toronto Press), edited by Paul Daly. See too his 2019 report on the United Kingdom in a collection on *Constitutional Asymmetry and Multinationalism*, co-edited by Patricia Popelier and Maja Sahadžićto, published by Palgrave Macmillan, and a chapter on 'Devolution in Northern Ireland' for the 9th edition of *The Changing Constitution* (Oxford University Press, 2019), co-edited by Jeffrey Jowell and Colm O'Cinneide. A chapter on 'Common Law Constitutional Rights at the Devolved Level' will appear in *Common Law Constitutional Rights*, co-edited by Mark Elliott and Kirsty Hughes for Hart Publishing (2020). With the help of a Leverhulme Emeritus Fellowship Dickson is currently researching the impact of state-reporting mechanisms on the protection of human rights in the UK. He is also pursuing his interest in the concept of 'fairness' in English law.

**Prof Cathy Gormley Heenan, Deputy Vice Chancellor, Ulster University**

Professor Cathy Gormley-Heenan is Deputy Vice-Chancellor (Research & External Affairs) at Ulster University and a Professor of Politics with research interests in the areas of political elites, peace processes, the politics of divided societies, public policy and governance. Until 2016, she was based in the School of Criminology, Politics & Social Policy at Ulster University where she was also Director of the Institute for Research in Social Sciences (IRiSS) from 2010-16. She holds a first class honours degree in politics from Queen's University, Belfast and an MPhil in Modern Middle East Studies with Arabic from Oxford University before becoming a UK Kennedy Scholar in the J.F.K. School of Government and Public Policy at Harvard University, USA. She holds a PhD in History and International Affairs from Ulster University. She is the Chair of the Universities UK's International Research Development Network as well as a member of the UK's Kennedy Scholars Association. She serves as a Trustee, Director, Board Member or Advisor on a range of external bodies and organisations including Innovation Ulster Ltd; Northern Ireland Science Park Property Ltd; Catalyst Inc; Matrix - the Northern Ireland Science Industry Panel; the Scottish Parliament's External Experts Panel; the ESRC's UK in a Changing Europe Advisory Panel; and the UK government's advisory body on EU Exit, Universities, Research and Innovation, among other things. Cathy is also a fellow of the Academy of Social Sciences.

**Prof Colin Harvey, Professor of Human Rights Law, Queen's University of Belfast**

Colin Harvey is Professor of Human Rights Law in the School of Law, Queen's University Belfast, a Fellow of the Senator George J Mitchell Institute for Global Peace, Security and Justice, and an Associate Fellow of the Institute of Irish Studies. He has served as Head of the Law School, a member of Senate, a Director of the Human Rights Centre, and as a Director of Research. Before returning to Queen's in 2005 he was Professor of Constitutional and Human Rights Law at the University of Leeds. He has held visiting positions at the University of Michigan, Fordham University, and the London School of Economics and Political Science. He has taught on the George Washington University – Oxford University Summer School in International Human Rights Law, and on the international human rights programme at the University of Oxford. He is a member of the Academic Panel at Doughty Street Chambers, a Senior Research Associate, Refugee Law Initiative, School of Advanced Study, University of London, a member of the Gender Identity Panel (Northern Ireland) and member of the Equality and Diversity Forum Research Network. Professor Harvey was a member of the REF2014 Law sub-panel and a member of the REF2014 Equality and Diversity Advisory Panel. He has served as a Commissioner on the Northern Ireland Human Rights Commission, and as a member of the Northern Ireland Higher Education Council. He is the Editor of the Series Human Rights Law in Perspective (Hart-Bloomsbury) and is on the editorial boards of Human Rights Law Review, Northern Ireland Legal Quarterly and European Human Rights Law Review. He has written and taught extensively on human rights law and policy and recently led an ESRC funded project on the consequences of Brexit for Northern Ireland (<https://brexitlawni.org/>).

He has undertaken a range of advisory roles, including as an invited expert at the Irish Convention on the Constitution on “The Right of Citizens Resident outside the State to Vote in Presidential Elections”, as a participant in UNHCR’s “Global Consultation on International Protection”, and as a consultant to the Global Commission on International Migration on “The Right to Leave in International Law”. He has provided evidence to, for example, the Scottish Affairs Committee, Westminster Parliament on the “Scottish Referendum”.

He is the General Editor of the Series Human Rights Law in Perspective (Hart-Bloomsbury Publishing) and is on the editorial boards of Human Rights Law Review, Northern Ireland Legal Quarterly and European Human Rights Law Review. His books include: *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (2014, Routledge, with Rory O’Connell et al.); *Contemporary Issues in Refugee Law* (2013, ed. Edward Elgar, with Satvinder Juss); *Human Rights and Public Finance* (2013, ed. Hart Publishing, with Aoife Nolan and Rory O’Connell); *Rights in Divided Societies* (2012 ed. Hart Publishing, with Alex Schwartz); *Human Rights in the Community: Rights as Agents for Change* (ed., 2005, Hart Publishing); *Sanctuary in Ireland: Perspectives on Asylum Law and Policy* (ed., with Ursula Fraser, 2003, Institute of Public Administration); *Human Rights, Equality and Democratic Renewal in Northern Ireland* (ed., 2001, Hart Publishing); *Seeking Asylum in the UK: Problems and Prospects* (2000, Cambridge University Press/Butterworths).

He has published articles in: *European Human Rights Law Review*, *Human Rights Law Review*, *International Journal of Refugee Law*, *Refugee Survey Quarterly*, *Modern Law Review*, *Northern Ireland Legal Quarterly*, *Cornell International Law Journal*, *Fordham International Law Journal*, *Policy & Politics*, *Journal of Law and Society*, *Social and Legal Studies* and *Public Law*, among others. He has been guest editor of several journal collections published in: *International Journal on Minority and Group Rights*, *Journal of Law and Society*; *Northern Ireland Legal Quarterly*; *Canadian Journal of Law and Jurisprudence*; *Refuge - Canada’s Periodical on Refugees*, and *European Human Rights Law Review*. He has written widely on human rights including in: *The Irish Times*, *The Guardian* and the *Times Higher Education Supplement* among others. Professor Harvey has undertaken funded research for the British Academy, the Nuffield Foundation, Atlantic Philanthropies, and the Joseph Rowntree Trust, among others.

**Prof Rory O’Connell, School of Law and Transitional Justice Institute, Ulster University**

Rory O’Connell joined the Transitional Justice Institute (TJI) and School of Law in 2013 as Professor of Human Rights and Constitutional Law. He was appointed TJI Director from 2014 to 2020. Rory’s research and teaching interests are in the areas of Human Rights and Equality, Constitutional Law and Legal Theory. He has published in the *International Journal of Constitutional Law*, *European Law Journal*, *Legal Studies*, *European Human Rights Law Review* and other journals. His books include *Applying an International Human Rights Framework to State Budget Allocations* (Routledge), *Human Rights and Public Finance* (Hart), *Legal Theory in the Crucible of Constitutional Justice* (Ashgate). His latest book *Europe, Law and Democracy* (Cambridge) will be published in 2020.

He was a member of the project team on the ESRC project ‘Brexit and Northern Ireland: The Constitutional, Conflict Transformation, Human Rights and Equality Consequences’ #BrexitLawNI. He is a member of the SAFEWATER project funded by the ESRC. He is also a member of the GCRF Research Hub on Gender, Justice and Security.

Rory is a Fellow of the Higher Education Academy, and teaches at both undergraduate and postgraduate level.

Rory is on the Executive of the Committee on the Administration of Justice and is the former editor of the RightsNI Blog. He has been actively involved in promoting international mobility in education: he served as one of the members of the UK team of Bologna Experts and was Director of the European Union Funded Intensive Programme (IP) on ‘The Borders of Europe’ 2009-2011.

Rory tweets @rjjoconnell and has a website at <https://conlawfiles.org/>

**Prof Aoife O’Donoghue, Law School, Durham University**

Professor O’Donoghue’s research centres on issues related to public international law, constitutionalism and feminism with a particular interest in global governance and legal theory. Aoife’s work examines constitutionalism, tyranny, utopias and feminism, legal theory and international legal history.

Currently, Aoife is heavily engaged with research and policy debates on Brexit with a particular focus on Northern Ireland including the ESRC funded project *Performing Identities: Post-Brexit Northern Ireland and the reshaping of 21st-Century Governance*. She works with Colin Murray, Sylvia de Mars and Ben TC Warwick on constitutional change, including Brexit and repeal of the Human Rights Act 1998 on Northern Ireland and future constitutional arrangements for the island of Ireland.

Aoife works on theories of tyranny and tyrannicide and currently writing a CUP monograph entitled 'Tyranny and the Global Legal Order'. Aoife alongside Ruth Houghton is developing ideas around feminist utopias, manifestos and global constitutionalism. With Máiréad Enright of Birmingham Law School and Julie McCandless of Kent Law School, Aoife is Co-Director of the Northern/Irish Feminist Judgments Project and is embarking on a new project with Máiréad Enright and Liam Thornton to revisit Irish constitutional texts.

Aoife worked with Rosa Freedman on the AHRC funded UN Gender Network. Aoife was a member of the International Law Association's working group on due diligence and her research on due diligence and international organisations was cited by the General Assembly.

**Dr Conor O'Mahony Faculty of Law, University College Cork**

Dr Conor O'Mahony is a senior lecturer at the School of Law at University College Cork, where he teaches and researches in the areas of constitutional law and children's rights. Among other areas of interest, he has written about constitutional amendment and referendums both in Ireland and the US in papers in Irish Political Studies, the Harvard Human Rights Journal and the Illinois Law Review. He was invited to address the Constitutional Convention in 2013 in its deliberations on marriage equality, and the Citizens' Assembly in 2018 in its deliberations on the referendum process. He has also been active in media analysis and advocacy during several Irish referendums.

**Dr Catherine O'Rourke, School of Law and Transitional Justice Institute, Ulster University**

Dr Catherine O'Rourke is Senior Lecturer in the School of Law and Director of the Transitional Justice Institute. She researches, teaches and engages in policy work in the fields of gender, conflict, transitional justice and international law. As a scholar, she has a noted record of publications and research grants. Her research has been supported by funders such as the Socio-Legal Studies Association, the Irish government's Reconciliation Fund and the UK's Department for International Development. Her scholarship has been recognized with the Irish Fulbright Scholar Award (2016/17) and the Basil Chubb Prize (2010) for the best PhD in politics produced in an Irish university. Catherine holds an LLB Law with Politics from Queen's University Belfast and MSc Gender from the London School of Economics. Her PhD, from Ulster University Transitional Justice Institute, was subsequently published as a monograph, 'Gender Politics in Transitional Justice' (Routledge, 2013). Her forthcoming monograph 'Women's Rights in Armed Conflict under International Law' will be published with Cambridge University Press in 2019.



She works with the Irish and UK governments, the United Nations and several non-governmental organizations in policy work related to her expertise. She is regularly commissioned by intergovernmental and non-governmental organizations to conduct expert research, such as UN Women and the Office of the High Commission on Human Rights, and the International Criminal Court Trust Fund for Victims

From February 26th, 2020, Dr O'Rourke will assume the Directorship of TJI.

### **Eilish Rooney, Transitional Justice Institute and ASPS, Ulster University**

Eilish Rooney is an Emeritus Scholar in the School of Applied & Social Policy Sciences and at the Transitional Justice Institute (TJI) in the School of Law. Eilish's research interests are in the areas of feminist intersectionality theory; women's lives in conflict; grassroots activism in post-conflict transition and conflict transformation.

She was educated at St Rose's Secondary School, Belfast, and returned to formal education as a mature student at Queen's University in 1975. Her undergraduate degree in English Literature led to postgraduate studies in Jacobean Drama, 1989. From the post of culture and politics tutor at the Ulster People's College, Belfast, she joined Ulster University as a lecturer in community studies from 1985 – 2018. She joined the Transitional Justice Institute in 2006. Her research and impact contribution was included in Ulster's law submission 2014 when TJI's research impact was rated 4\* (world-leading) and ranked first for research impact across UK Law units.

In partnership with the Ashton Trust's Bridge of Hope, she developed the TJI's Transitional Justice Grassroots Toolkit programme and authored the programme's toolkit, guide and training manual. Other publications include: Justice Dialogue for Grassroots Transition, Policy & Practice: A Development Education Review, 2018; International Journal of Transitional Justice Special Issue: Transitional Justice from the Margins: Intersections of Identities, Power and Human Rights, Oxford, 2018, edited with Fionnuala Ní Aoláin; Intersectionality – working in conflict, The Oxford Handbook of Gender and Conflict, Oxford University Press, 2018.

She is the Transitional Justice Institute representative on the Women Peace and Humanitarian Fund and an intersectionality expert group member of the UN Economic and Social Commission for Western Asia.

**Dr Anne Smith, School of Law and Transitional Justice Institute, Ulster University**

Anne is a Senior Lecturer at the Transitional Justice Institute and the School of Law. She teaches at both undergraduate and postgraduate levels. Her research and teaching interests are transitional constitutionalism, comparative constitutional law, human rights and equality. She has published widely in these areas and is currently writing a book on *Negotiating Social Justice: The Drafting of Bills of Rights* (Hart Publishing, forthcoming). Anne's research has been supported by grants from Joseph Rowntree Charitable Trust. Anne was invited by the Irish Research Council to act as a remote reviewer for applications to COALESCE Research Fund.

She is a Senior Fellow of HEA and a Fellow member of CHERP, and teaches at both undergraduate and postgraduate level. She received the 'Excellence in Teaching' award (Faculty of Social Sciences category) at Ulster University Students' Union Awards Ceremony in June 2016. Anne read Law and Government at Ulster University and graduated with a BA Hons (2:1, first in year). She then graduated at the same university with an LLM in European Law and Policy in December 1999. She proceeded to write a PhD thesis on Bills of Rights graduating in December 2007 at Ulster University receiving an unconditional pass. Anne is an Executive member of the Committee on the Administration of Justice and is a member of various organisations such as the British Association for Canadian Studies, the UK Constitutional Law Association (UKCLA) and the Society of Legal Scholars (SLS). She is also involved in various research networks, including the Academic Network on the European Social Charter (ANESC/RACSE) and was the co-ordinator for the Economic and Social Rights Academic Network UK and Ireland (ESRAN-UKI) from March 2017-November 2018. Anne is also a peer reviewer for several journals such as *Interdisciplinary Journal of Human Rights Law*; *Nordic Journal of International Law*; and the *Journal of Human Rights*.

**Dr Silvia Suteu, Faculty of Laws, University College London**

Dr Silvia Suteu joined the UCL Faculty of Laws in September 2016. She was previously a tutor and ESRC Research Fellow at the University of Edinburgh, where she also co-founded and convened the Constitutional Law Discussion Group and acted as Associate Director for Research Engagement of the Edinburgh Centre for Constitutional Law. Prior to that, she held research positions at the Geneva Academy of International Humanitarian Law and Human Rights (on the Rule of Law in Armed Conflicts Project), the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), and the Radcliffe Institute for Advanced Study. She currently also serves as manager of the UK Constitutional Law Association Blog.

Silvia's current research interests are in comparative constitutional law and constitutional theory. She is especially interested in the theory and practice of deliberative constitutional change, constitutional entrenchment and democratic theory (in particular eternity clauses), transitional constitutionalism, and gender-sensitive constitution-making. She has also done work in international humanitarian and human rights law. Silvia has provided legal expertise on constitution building to organisations including Democracy Reporting International, the Euromed Feminist Initiative, International IDEA and UN Women.

**Dr Jane Suiter, Dublin City University, Director of the Institute for Future Media and Journalism (FuJo)**

Jane is an Associate Professor in the School of Communications at Dublin City University. Jane's expertise lies mainly in the area of the public sphere; and in particular participation and political engagement. Her current research focus is on citizens' assemblies and on disinformation.

She is co-PI on the Irish Citizen Assembly (2016-2018) and the Irish Constitutional Convention (2012-2014) and a founder member of We the Citizens (2011), Ireland's first deliberative experiment. She is a member of the Research Advisory Group on the Scottish Citizens' Assembly.

She has published in 30 plus journals including Representation, International journal of Political Science, Electoral Studies, Politics and the International Journal of Communication and is the author of two books including Reimagining Democracy: Lessons in Deliberative Democracy from the Irish Frontline published by Cornell University Press.

Her research is comparative: besides Ireland, her recent projects have included all European democracies as well as most of the OECD. Jane is currently PI of PROVENANCE a H2020 project tackling disinformation in the social sphere and PI of the Reuters Digital News Report (Ireland) and PI of a Marie Curie ETN JOLT on harnessing technology for journalism, .

Jane is a Visiting Fellow at the Reuters Institute, Oxford University, communication chair of COST ISI308 examining populist political communication and is on the Standing Committee of the ECPR standing group on Democratic Innovations. Jane is a frequent contributor to broadcast and print media, has given evidence at parliamentary committees and is a former journalist having worked as Economics Editor at The Irish Times and for other media such as the FT Group and AP Dow Jones.

**Ciaran White, School of Law, Ulster University**

Ciaran White has been a Senior Lecturer in Law at the Law School, Ulster University, since 2000, having been a lecturer since 1991, and a Research Assistant in the Queen's University, Belfast before that, from 1990-1991. Educated in University College Cork, Queen's University Belfast and the Honorable Society of King's Inns, he has academic interests in public law, employment law and family law, in which areas of law he has also practised at the Northern Ireland Bar since 2003. He has a long-standing interest in issues of human rights, discrimination and equality, reflected in some of his publications and his activist work in the past and in the present: for example, he was chair of the CAJ's Racism sub-group that campaigned successfully for the introduction of the Race Relations (NI) Order in 1997 and from 2009 until its formal termination in 2016, he was a member of the Advisory Group of Disability Action's, Centre for Human Rights for Disabled Persons. He is also the author of 'Northern Ireland Social Work Law', the primary legal text used in the education of social work students and in social work practice in Northern Ireland. With strong interests in the leveraging of the legal academic and practice worlds, he was Director of the Ulster University Law Clinic, a live client clinic in which law students represented public clients in employment and social security tribunals, a first for the island of Ireland, from 2012-2016. He also promotes mootings amongst the student body as part of this interest.

**Alan Whysall, University College London**

Alan Whysall has for most of the last 20 years been involved with the Northern Ireland peace process as a senior British civil servant in the Northern Ireland Office (with spells in the Cabinet Office in London).

He left British Government in summer 2015 and is now Honorary Senior Research Associate at the Constitution Unit at University College London.

**Prof Richard Wyn Jones, Director of Cardiff University's Wales Governance and Dean of Public Affairs**

Richard Wyn Jones is Director of Cardiff University's Wales Governance and Dean of Public Affairs. He has written extensively on contemporary Welsh politics, devolved politics in the UK and nationalism.

Richard was one of the founders of Critical Security Studies and was previously Professor of Welsh Politics and founding Director of the Institute of Welsh Politics at the Department of International Politics, Aberystwyth University.

Richard is a regular and widely respected broadcaster, commentating on Welsh politics in both Welsh and English for the BBC in Wales and across the UK. He has also presented two TV series and is a regular columnist for the Welsh language current affairs magazine Barn.

Richard is a Fellow of the Learned Society of Wales and the Academy of the Social Sciences.



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